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Supreme Court, U.S.
FILED

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No.

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

LOIS E. ADAMS, *ET AL.*,

Appellants,

v.

WILLIAM JEFFERSON CLINTON, *ET AL.*

Appellees

On Appeal from
The United States District Court
for the District of Columbia

JURISDICTIONAL STATEMENT

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208 PP

QUESTIONS PRESENTED FOR REVIEW

On the premises that Congress holds the power of "exclusive legislation" over the District of Columbia and holds or has held identical power over thousands of other places throughout the United States where millions of people reside, Appellants ask:

> Whether Appellants' rights to the equal protection of the laws are violated because Congress has not included them in existing apportionments of congressional districts, while all other people over whom Congress holds or has held identical powers under the Constitution are included in apportionments of congressional districts, and are so in the same manner and on the same terms as all citizens of the United States are included in such apportionments.

And provisionally, given the posture of this appeal:

> Whether Appellants' rights to the due process of law were violated when the court below entered judgment on their case without addressing their unique claims, arguments, and evidence, instead basing its judgment on analysis of claims and arguments presented in a separate case based on antithetical theories and seeking adverse relief.

PARTIES TO THE PROCEEDING

Appellants (Plaintiffs below) are Lois E. Adams, the Rev. Mr. Floyd H. Agostinelli, Acie L. Byrd, Jr., Lawrence Alston Gray, the Rev. Graylan Scott Hagler, Lawrence Benjamin Harris, Wimberly Higgs, Bette J. Hoover, Anise Jenkins, Rahim Jenkins, Marilyn Killingham, Dujuan Ricardo Malachi, Lamont B. Mitchell, Loree H. Murray, the Rev. Anita O'Brien, Sam Smith, and Malcolm L. Wiseman, Jr.. All Appellants are private individuals; none is a non-governmental corporation.

Appellees (Defendants below) are William Jefferson Clinton acting in his official capacity as the President of the United States, Jeff Trandahl acting in his official capacity as the Clerk of the United States House of Representatives,* and Wilson Livingood acting in his official capacity as the Sergeant at Arms of the United States House of Representatives.

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* Robin H. Carle was the Clerk of the House when the Complaint was filed, but she was succeeded in office by Mr. Trandahl in January of 1999, so Mr. Trandahl succeeds to her place in the case under Federal Rule of Civil Procedure 25(d)(1).

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JURISDICTIONAL STATEMENT

Plaintiffs before a Three-judge District Court of the District of Columbia appeal from the final judgment of that court dismissing their demands for permanent injunctions.

OPINIONS BELOW

The opinions of the Three-judge District Court are reported at 90 F.Supp.2d 35-107 and are reproduced in Appendix ("App.") A (Memorandum Opinion of the majority), App. B (Judgment), and App. C (dissent of Judge Oberdorfer).

BASIS OF JURISDICTION

The Three-judge District Court entered judgment on March 20, 2000 and no further matters are pending before it. Notice of appeal was filed on May 17, 2000 (App. H). This Court has jurisdiction over this appeal under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

This case involves Article I, § 8, cl. 17 (the "District/Enclaves Clause") and Article IV, § 3, cl. 2 (the "Territories Clause") of the Constitution. Appellants' claims are based upon the implicit equal protection provision of the Amendment V. These provisions are reproduced in App. D.

The court below had jurisdiction under 28 U.S.C. § 2284(a) and Appellees' actions at issue in the case are authorized or defined under 2 U.S.C. §§ 2a(a), 2a(b), 2b, 2c, & 26, all of which are reproduced in App. E.

STATEMENT OF THE CASE

A: Overview

For more than three-quarters of our nation's life, millions of United States citizens who lived in thousands of places where Congress exercises the power of "exclusive legislation" under the Constitution were excluded from apportionments of congressional districts. The fact that Congress exercised the power of exclusive legislation over

these places – the "federal enclaves," the former portion of the District of Columbia south-west of the Potomac River, and the continental territories – meant that, as a matter of law, they were not parts of the States or States in their own right. So long as these places were not States or parts of States, they could not be included in apportionments of congressional districts under Article I of the Constitution.

The legal status of all these places changed, however, and this change is at issue in *Adams v. Clinton*. Congress changed the status of these places, so they are now, legally, integral parts of the States or are States in their own right. Thus, the people who reside in these places are entitled to State citizenship and they are included in present apportionments of congressional districts under the terms of Article I.

Without amending the Constitution, without creating a unique, derivative class of solely "federal citizens," without undermining the plain terms of the Constitution, Congress could do for the District of Columbia[1] precisely what it did for all these places, for the power it exercises over the District is constitutionally indistinguishable from the power exercised over the other places to which it is compared in *Adams*. There is no textual or factual reason to limit the change to the other places, especially when the cost is denial of a plethora of fundamental rights of the residents of the District.

Because Congress *has not* treated the residents of the District of Columbia in the same way as it has treated all other, similarly-situated or identically-situated people and because there is no reason whatsoever for it (much less a compelling reason), Congress, acting by and through Appellees, violates the rights of the residents of the District of Columbia to equal treatment under the law. Therefore, the Court can and should restrain Appellees from executing or enforcing measures passed by Congress which reflect clearly favorable treatment of all people similarly-situated to the

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[1] – or at least all of the District outside the area where the Federal government is actually "Seated." *See* 40 U.S.C. § 136 (defining the "National Capital Service Area").

residents of the District of Columbia under the Constitution.

Generally, *Adams v. Clinton* asks the Court to order that the *status quo* shall not continue. Appellants demand permanent injunctions that no apportionment be reported by the President, 2 U.S.C. § 2a(a), or the Clerk of the House, 2 U.S.C. § 2a(b), nor enforced by the Sergeant at Arms of the House, which does not include the residents of the District of Columbia under the terms of the Constitution (App. F at 25-28). This relief leaves to the residents of the District of Columbia and to Congress the political decisions *how* to incorporate the non-federal portions of the District of Columbia into our federal system.[2]

And independently, this remedy and the arguments on which it's based would also repair a *rift* in the law defining the effects of the power of "exclusive legislation." The law defining the status of the federal enclaves and the District of Columbia was *uniform* until 1953. Since then, the Court has countenanced Congress' revised treatment of the enclaves, but the Court has never addressed the now-divergent treatment of the District of Columbia. Yet remnants of the older doctrine still create sporadic problems for the federal enclaves, indicating how this now-unsettled doctrine – the same which supports the divergent treatment of the District of Columbia – places the constitutionality of the otherwise

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[2] It's important to note what *Adams does not* seek. No court can order Congress to admit the District of Columbia as a state, nor can a court determine that the District already *is* a state. Admission to statehood is a political act which lies with Congress, so *Adams* doesn't ask the courts to do what they cannot and should not do. Neither does *Adams* ask the Court to conclude that, after 200 years of legal and political separation from the State of Maryland, the District of Columbia always has remained part of Maryland, even though this follows from the Court's decision in *Howard v. Commissioners of Sinking Fund*, 344 U.S. 624 (1953) (*see infra*). The rift in the doctrine of exclusive legislation opened in *Howard* can be repaired by the Court, but actual unification of the District with Maryland would require *political* acts by the people of the District and Maryland and by Congress.

salutary treatment of the federal enclaves in question. *Adams* offers a chance to repair the rift in the law and restate a unified doctrine of Congress' power of "exclusive legislation."

B: Historical Background to *Adams*' Claims

Under the Constitution, Congress holds or has held the power of "exclusive legislation" over *four* identifiable categories of physical places: (1) the present District of Columbia, (2) the former portion of the District south-west of the Potomac River, (3) the "federal enclaves," and (4) the continental territories.

Originally, the District of Columbia comprised 100 square miles; approximately one-third of it was south-west of the Potomac River. Constance McLaughlin Green, *Washington; Village and Capital, 1800-1878*, 3-22 (1962). Under the "District/Enclaves Clause," art. I, § 8, cl. 17 (printed in App. D), these places together comprised "one political community, united under one government." *Bank of Alexandria v. Dyer*, 39 U.S. (14 Pet.) 141, 145-46 (1840). Therefore, the former portion of the District was *identically*-situated to the remaining District as a subject of Congress' power of "exclusive legislation" under the Constitution.

Under the same Clause, art. I, § 8, cl. 17, Congress has acquired the power of "exclusive legislation" over what came to be called, collectively, "federal enclaves." *See, e.g., West River Elec. v. Black Hills Power & Light Co.*, 918 F.2d 713, 718 (8th Cir. 1990). Congress's power over the enclaves is identical, constitutionally, to that held over the District of Columbia. *Paul v. United States*, 371 U.S. 245, 263 (1963); *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 528, 532-33 (1885). By the middle of the Twentieth Century, Congress exercised the power of exclusive legislation over 5,050 federal enclaves, General Services Administration, *Inventory Report on Jurisdictional Status of Federal Areas Within the States* (1959),[3] where as many as a million people resided, Carl

[3] Had Congress been so inclined, it could have extended its power of exclusive legislation to cover one third of the land area of

Strauss, *Federal Enclaves–Through the Looking Glass–Darkly*, 15 Syracuse L. Rev. 754 (1964). Today, at least three million people reside in federal enclaves which are military bases alone. Michael J. Malinowski, *Federal Enclaves and Local Law: Carving Out a Domestic Violence Exception to Exclusive Legislative Jurisdiction*, 100 Yale L. Rev. 189, n.1 (1990).

Finally, under the "Territories Clause," art. IV, § 3, cl. 2, Congress has held constitutionally identical power of exclusive legislation over the continental territories.[4] *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 105-06 (1953); *Corporation of New Orleans v. Winter*, 14 U.S. (1 Wheat.) 91, 95 (1816). Except for the original thirteen States, the three States carved from the original States, and Texas, all the rest of the United States was once under the same kind and degree of power as the District of Columbia remains today. Marion Clawson, *Uncle Sam's Acres*, 18-30, 38-39 (1951, 1970).

As noted above, analysis of the legal effect of Congress' power of "exclusive legislation" over all these places was uniform throughout most of our history. Since the rift in this uniformity first became apparent in consideration of Congress' treatment of the federal enclaves, the enclaves are a good place to focus discussion.

Although the federal enclaves are located within the geographic boundaries of admitted States, Congress' power of exclusive legislation once severed the residents of the enclaves from the States as a matter of law. *Fort Leavenworth, supra*, 114 U.S. at 528-29, 537-38. Therefore, when congressional districts were apportioned to each State, the residents of the federal enclaves were not included in any

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the United States. See Stephen E, Castlen & Gregory O. Block, *Exclusive Federal Legislative Jurisdiction: Get Rid of It!*, 154 Mil. L. Rev. 113, 117-21 (1997); U.S. Geol. Survey, *Federal and Indian Lands* (1998) (map in the Record).

[4] The continental territories are distinguished from the so-called "insular territories" such as Puerto Rico, *see Downes v. Bidwell*, 182 U.S. 244 (1901), for a variety of reasons neither dispositive or instructive to the instant case.

apportionments of any congressional districts; the residents of the federal enclaves did not vote for any members of the United States House of Representatives, nor for U.S. Senators, nor for any state legislators or governors.[5] *Jurisdiction Over Federal Areas Within the States; Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas Within the States; Part I: The Facts and Committee Recommendation*, 19-20, 49-58 (1956) ("1 JOFAWS"); *Ibid., Part II: A Text of the Law of Legislative Jurisdiction*, 219-25 (1957) ("2 JOFAWS"); U.S. Dept. of Justice, Land and Natural Resources Div., *Federal Legislative Jurisdiction*, 67-68 (1969).

The earliest legal statement of this doctrine was *Reily v. Lamar*, 6 U.S. (2 Cranch) 344 (1805). In *Reily*, the Court declared that by taking up residence *in the District of Columbia*, Reily lost his Maryland state citizenship. *Id.* at 356. Congress' assumption of the power of exclusive legislation severed the District from Maryland (and Virginia) and stripped State citizenship from those who lived within the District. This doctrine, rooted in analysis of the District of Columbia, defined the District *and* the federal enclaves for more than 150 years. *See, e.g., Royer v. Bd. of Election Supervisors*, 231 Md. 561, 191 A.2d 446, 449, *cert. denied*, 375 U.S. 921 (1963).

This uniform doctrine was disrupted in 1953, however, when the Court ruled in *Howard v. Commissioners of Sinking Fund*, 344 U.S. 624 (1953), that Congress's exercise of exclusive legislation over a federal enclave does not take the enclave out of the State within which it might be located, *id.* at 626-27, so does not sever State citizenship of the residents of the enclave. But while *Howard* marked the opening of a rift in the hitherto uniform doctrine defining the effect of Congress' constitutional power of exclusive legislation, *Howard* only gave judicial recognition to a wholesale shift in treatment of the federal enclaves by *Congress*.

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[5] Except in a few, accidental instances where local state officials either were unaware of or ignored the legal "extraterritoriality" of the enclaves.

Over a period of years, Congress had ceded increments of its legislative authority over the enclaves to the States, even though, in most cases, Congress did not yield its power of "exclusive legislation." *See Howard, supra*, 344 U.S. at 627. As Congress ceased "excluding" state power from the federal enclaves, the States extended their powers into the enclaves. Gradually, the federal enclaves came to be legal and political parts of the States. *See Comman v. Dawson*, 295 F.Supp. 654, 656-58 (D. Md. 1969), *aff'd sub nom Evans v. Comman*, 398 U.S. 419 (1970). This result followed even where Congress never completely ceded its power of "exclusive legislation."

Of course, since the federal enclaves came to be considered political parts of the States, the residents of the federal enclaves came to be treated as citizens of the States for all – or almost all – purposes. Most importantly to the issues in the instant case and insofar as the federal government was concerned, the residents of the federal enclaves had come to be included in the census as citizens of the States, thus included in determining congressional apportionments. *Evans v. Comman*, 398 U.S. 419, 421 (1970).

Some problems remained for the residents of the enclaves, however, arising from actions by the *States*. Most States continued to maintain that the residents of the enclaves were still not citizens of the States for the purposes of voting in State and Federal elections. *See Royer, supra*. Their resistance ended with *Evans, supra*, where the Court held that, once a State treated residents of the enclaves for most purposes *other than* voting, the State couldn't exclude them from *voting* on an equal basis with all other citizens of the State. And even though Congress can still "restrict as well as extend the powers of the States within" the enclaves in the present and future, *id.*, 398 U.S. at 423-24, Congress *has not* seen fit to "exclude" the States from the enclaves, which would re-segregate the enclaves from the States.

The net result of Congress' change of heart concerning the federal enclaves is that today, *all* residents of federal enclaves are apportioned to congressional districts, and all States are apportioned sufficient congressional districts to

include all residents of the federal enclaves. Of course, because of the nature of the shift and under the terms of the Constitution, all residents of the federal enclaves *also* vote for U.S. Senators (which are not "apportioned," strictly speaking) and for state and local legislators, governors, mayors, and so on. And even though the Federal government rightly and properly continues to assert significant federal interests in the federal enclaves, these interests are not infringed by allowing the residents to be citizens of states in every respect, for every purpose.

The history of the former portion of the District of Columbia south-west of the Potomac River is really just a succinct version of this history of the federal enclaves. When the former portion of the District of Columbia was under Congress' power of "exclusive legislation," the residents were not residents of the Commonwealth of Virginia, so they were not apportioned to any congressional district. After Congress ceded its legislative powers to Virginia in 1846, however, Act of July 9, 1846, 9 Stat. 35, ch. 35, the residents of this portion of the District became full citizens of Virginia, and were apportioned to a congressional district.

Today, Virginia is apportioned eleven congressional districts. The most densely populated half of the *eighth* district is composed of the former portion of the District of Columbia. If that portion *had not* been ceded to Virginia in 1846 – and certainly if Congress *had not* also allowed Virginia to extend her legal and political powers into all the federal enclaves in the Commonwealth – Virginia would not have as many as eleven congressional districts today.

Congress' treatment of the final category – the continental territories – has been only slightly different from its treatment of the federal enclaves and the former portion of the District of Columbia south-west of the Potomac River. As a matter of law, Congress's power of exclusive legislation over the territories is identical in every way to its power over the enclaves and over both the former and present portions of the District of Columbia. *See supra* at 5. While Congress retained this power and did not admit the territories as States,

the residents of these territories were not apportioned representation in Congress. Once Congress admitted a territory as a State and withdrew its power of exclusive legislation (*except for* places Congress "reserved" as federal enclaves or for Indians), the residents of the former territories (those living outside the enclaves or Indian Reservations) were apportioned representation in Congress.

All these places under Congress' power of exclusive legislation were woven into the political fabric of the United States without amendment of the Constitution or creation of derivative classes of citizenship or treatment of the residents as extraneous-but-privileged. All Congress had to do for the former portion of the District south-west of the Potomac and for the federal enclaves was withdraw its power of exclusive legislation and allow their incorporation into the States. All Congress had to do for the continental territories was admit them as States.

Through either course of action, today, the millions of residents of these places "are citizens of the United States and of the State wherein they reside." U.S. Const., amend. XIV, § 1, cl. 1. Today, these millions are included in apportionments of congressional districts *and* they are included under the *same* constitutional terms and conditions as are *all* citizens of the United States. U.S. Const., art. I, § 2 & amend. XIV, § 2; art. I, § 3 & amend XVII, [¶¶] 1 & 2.

There is one exception to this pattern. Congress has held out one place and insured that, *of all* places where Congress has or has had the power of "exclusive legislation" under the Constitution, this place is treated differently, such that the people who reside in the place remain excluded from any apportionment of congressional districts because they do not live in a State. This place is the District of Columbia.

C: Summary of Differential Treatment or Status

In light of this history, two related questions present themselves. Is there a clear *textual* reason in the Constitution for the District of Columbia to be treated *differently* than Congress has treated all other places over which it has or has

had identical powers? If not, is there a compelling, factual, governmental purpose which necessitates such differential treatment? These are questions of first impression.

When courts have addressed the effects of "exclusive legislation" on the *enclaves* under the District/Enclaves Clause, art. I, § 8, cl. 17, they have not addressed the impact of their decisions on the District of Columbia. But a rift opened with *Howard* and *Evans* made it stark: the federal enclaves are treated differently than the District of Columbia is treated and it's not at all clear as a matter of constitutional *law* – much less as a matter of demonstrable *fact* – why.

Although most federal enclaves remain under Congress's power of "exclusive legislation" under the District/Enclaves Clause and although all enclaves – by definition – are places where there is a demonstrable federal interest, the people who live within the enclaves are citizens of the States. The doctrine enunciated by the courts has concluded that they are entitled to *all* the rights and responsibilities, privileges and immunities which arise from *State* citizenship. Of course, because they are citizens of a State, they are included in apportionments of representation in Congress.

Simultaneously, even though there is no demonstrable – much less compelling – federal interest, generally, in any of the District of Columbia outside the National Capital Service Area, *see* 40 U.S.C. § 136, the District of Columbia remains under Congress's power of "exclusive legislation" under the District/Enclaves Clause. But the residents are not citizens of any State and Congress has not taken the simple steps it has taken for all other places over which it holds identical powers which would make the residents of the District citizens of a State. Congress continues to "segregate" the District from the remainder of the country, just as all other places over which it holds identical powers *were* segregated in the past.

The differential treatment is most stark when the District of Columbia is compared to its former constituent portion south-west of the Potomac River. That portion was defined to serve the same purported purpose as the "Seat" of the Federal government, under the same exact words of the

Constitution, yet it is now part of a sovereign State (though it embraces such critical governmental installations as the Pentagon). Those who live there, within sight of the Capitol, are included in apportionments, while those who live further away yet within the District of Columbia are not.

And the differential treatment is only less immediately apparent when the District of Columbia is compared to the continental territories. Congress has multiplied these United States to a number never contemplated by the Framers, including even islands in the middle of the Pacific Ocean. Meanwhile, those who live in a place the Framers themselves knew remain segregated from our federal system. Treatment of our continental territories is exemplary; it should be an example for treatment of the District of Columbia as well.

D: The Genesis of this Case

Adams v. Clinton challenges the fact that Congress treats the residents of the District of Columbia *differently* than it has treated all other people over whom it has now or has had *identical* powers under the Constitution.

Appellants are competent, adult residents of the District of Columbia. *But for* their residence in the District, each would be qualified to vote in any election under laws typical of those enacted in states. No Appellant works for the United States government or resides in a building owned or used by the federal government for any purpose. Despite the fact that Appellants have nothing to do with the "Seating" of the federal government and despite the fact that they live in neighborhoods indistinguishable from urban neighborhoods anywhere in the United States, Appellants are not included in any apportionment of any congressional district.

Therefore, Appellants filed suit in June of 1998 (Complaint reproduced in App. F), claiming that the Congress of the United States, acting by and through the President of the United States, the Clerk of the House of Representatives, and the Sergeant at Arms of the House of Representatives (the agents charged by Congress to calculate apportionments of congressional districts according to congressional directions,

report those apportionments to the states, then enroll and admit Representatives pursuant to those apportionments, *see* App. E) infringe Appellants' rights to the equal protection of the laws and to republican forms of governments under the Constitution.[6] Appellants demanded injunctions that no calculations, reports, or ensuing actions, part and parcel of apportionments of congressional districts, be undertaken or enforced, which do not include the residents of the District of Columbia. *See supra* at 3-3 and *infra*, App. F at 25-27.

Because *Adams* concerned apportionment of congressional districts, Appellants asked that the case be set before a Three-judge District Court pursuant to 28 U.S.C. § 2284(a). Appellants' request for a three-judge District Court was granted on November 6, 1998 (*see* App. G).

Adams also lodged separate claims against Defendant/Appellee Clinton and an additional Defendant – the District of Columbia Financial Responsibility and Management Assistance Authority. These claims concerned congressional government of the District through the agencies of the Defendants (*see* App. F at ¶¶ 7, 12, 26-29, 70-72, 91, 93, 95, 112) and did not concern apportionments. Since the Three-judge District Court below *remanded* these claims to a single District Judge (*see infra*), these claims were not addressed in the judgment of the Three-judge Court from which appeal is taken, so these claims are not now before the Court.[7]

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[6] Though *Adams'* equal protection claims run against agents of the Federal government, it seems well-settled that the Federal government is bound to the same duty of "equal protection" or equal treatment as are the states. *See Schneider v. Rusk*, 377 U.S. 163, 168 (1964) ("While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)).

[7] These claims are now on appeal to the District of Columbia Circuit.

E: Advent of a Second, Independent Case

Several months after Appellants filed their suit, an unrelated group of plaintiffs filed a separate suit styled *Alexander v. Daley*. Although *Alexander* is also concerned with representation in Congress, *Alexander* is based on legal arguments which are antithetical to those in *Adams*. Also, *Alexander* seeks a remedy which, itself, would violate the rights of the residents of the District under the arguments and construction of the Constitution found in *Adams*.

Generally, *Alexander* asks for a judgment that Congress pass unique legislation to provide some form of representation for the residents of the District of Columbia, either by legislatively construing Article I of the Constitution to treat the District as if it were a State for the purposes of Article I of the Constitution (but for no other purpose) or by legislatively construing the District to be part of Maryland for the purposes of voting for Maryland's representatives in Congress (but for no other purpose). Thus, *Alexander's* remedy is *predicated on* the same assumption *challenged* in *Adams*: that Congress may single the District out for differential treatment not extended to any other place.

As the Constitution is construed by *Adams*, either of *Alexander's* remedies would itself violate Appellants' rights to equal treatment because each would treat the residents of the District of Columbia *differently* than the residents of similarly-situated places are treated and their resultant status would be *inferior* to that enjoyed by residents of similarly-situated places. Under *Alexander*, all persons under Congress' power of "exclusive legislation" *other than* the residents of the District of Columbia would be included in apportionments under the un-augmented terms of the Constitution, *see generally Powell v. McCormack*, 395 U.S. 486 (1969), neither by way of legislative concession nor legislative definition of those terms (not to mention that all enjoy all other rights and responsibilities of *State* citizenship), while the residents of the District would remain beholden to Congress for the terms and conditions of entry to the House.

F: Proceedings and Opinions Below

Sua sponte, the single judge to whom both cases had been assigned asked all parties to show cause why the cases should not be consolidated. Against a showing by *Adams* that consolidation presented serious risks of confusion and conflict, the court consolidated (but did not merge) the cases.

Separate *Motions for Summary Judgment* were filed by each set of plaintiffs in the two cases below and separate *Motions to Dismiss* were filed by each defendant in each case. All dispositive motions were heard in oral argument on April 19, 1999. Eleven months later, on March 20, 2000, the Three-judge District Court issued its judgment (reproduced in Appendices A, B., & C, *infra*).

The Three-judge District Court remanded *Adams*' issues concerning Congressional governance of the District (App. F at ¶¶ 7, 12, 26-29, 70-72, 91, 93, 95, 112) to the original single judge to which the case was first assigned, declining to exercise jurisdiction over issues which did not concern apportionment of congressional districts (App. A at 4-6). Since these issues were not addressed on the merits by the Three-judge Court, they are not before this Court on appeal.

The Three-judge District Court found that Plaintiffs in both cases have standing and that the questions presented are justiciable (App. A at 6-15 & C at 1 n.1), but the majority of the Three-judge Court decided against Plaintiffs in both cases (App. A at 16-60 & App. B). Unfortunately, neither the majority of the Three-judge Court nor the sole dissenting judge analyzed the actual arguments, evidence, or claims presented in *Adams*. Rather, the majority analyzed the claims and arguments presented in *Alexander* which, by definition, are distinct and antithetical to those presented in *Adams*.

Over half the majority's memorandum (App. A at 15-49) is devoted to analysis of "the *Alexander* plaintiffs' contention[:]"

> that District residents can fairly be characterized as citizens of a "state," as the term was intended in Article I, under either of two theories[: . . .] that the District of Columbia itself may be treated as a state through which its citizens may vote [or] that District

> citizens may vote in congressional elections through the State of Maryland, based on their "residual" citizenship in that state[.]"

(App. A at 16). Not only is this claim not made in *Adams*, it is contrary to the claims made in *Adams* (App. F at ¶¶ 35-36). So barely a sixth of the majority's memorandum is left to discussion of all remaining claims, including those in *Adams*.

It appears the majority may have intended to address a claim made in *Adams* in its discussion of claims "that the District's lack of representation in the House deprives its residents of the equal protection of the laws" (App. A at 50-54). This discussion, however, is also actually limited to the claim in *Alexander*. In general, the difference between the equal protection claims in the two cases is as follows.

Adams asserts Congress violates the rights of D.C. residents because it has not placed D.C. residents in *the same status* (actual citizenship in states) as it has placed all other people over whom Congress has or has had identical powers. Thus, *Adams* seeks strictly *equal treatment* of all similarly-situated subjects of Congress' constitutional powers.

Conversely, *Alexander* asserts Congress violates the rights of D.C. residents because it has not placed D.C. residents in *a unique status* in which they can exercise an opportunity to vote comparable to that exercised by all other citizens of the United States. Thus, *Alexander* seeks a comparable result (opportunity to do something everyone else does, *i.e.*, vote) by way of strictly *unique treatment*.

The court below was clearly concerned with the latter claim alone. The court opened its analysis observing that "the plaintiffs" contend that "the District's lack of representation in the House deprives its residents of the equal protection of the laws [and] renders them unequal to the residents of the fifty states and of the federal enclaves." App. A at 50 (citing *Alexander* Plaintiffs' Summary Judgment Memorandum), which is to start with the comparable *result* at issue in *Alexander*. But thus the court below starts its analysis by ignoring the threshold of *Adams*' analysis, which is to compare *similarly-situated, discrete populations* under

Congress' power of "exclusive legislation" and trace their differential treatment. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964); *D.C. Fed. of Civil Assn's v. Volpe*, 434 F.2d 436, 439 (D.C. Cir.-1970).

The differential treatment at issue in *Adams* is that Congress opted to facilitate a transition for all people similarly-situated to the residents of the District, such that they are all citizens of the States, while Congress has blocked that transition for the residents of the District. So, if all people similarly-situated to residents of the District of Columbia *were not now* included in apportionments of congressional districts, *Adams* might have no equal protection claim *to be* included in apportionments of congressional districts.[8]

It's also important to note that, contrary to *Alexander*, *Adams* makes no claim that people who are *not* citizens of States are entitled to equal participation in the Federal Government *with* the citizens of the States. The United States is a federal system; all citizens (other than residents of the District of Columbia) enjoy the benefits and burdens of living under *dual* sovereignty – that of a State and that of the United States. Before *Howard, supra*, the uniform doctrine of "exclusive legislation" provided a judicial rationale for committing some people to the sole sovereignty of the Federal Government. But the rift in the law of "exclusive legislation" which opened in *Howard* shows that there is no constitutional basis–much less necessity–for sole sovereignty, which is a necessary component of *Alexander's* comparison of residents of the District to all citizens of the United States.

To resolve *Alexander's* equal protection claim, the court below observed:

> the inability of District residents to vote is a consequence of Article I. Similarly . . . the contrasting ability of enclave residents to vote is not the

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[8] This is only a result of the strict legal arguments in *Adams*. Were this a political or academic debate rather than a law suit, Appellants in *Adams* would contend that the residents of the District of Columbia *should* enjoy a *status* identical to that of all U.S. citizens.

> consequence of legislative line drawing, but rather of the Supreme Court's decision in *Evans* that enclave residents have a constitutional right to vote–a holding we are unable to extend to District residents both because of distinctions between the manner in which Congress has exercised its authority over the enclaves and the District, and because of the Supreme Court's decision in *Albaugh* [*v. Tawes*, 233 F.Supp. 576 (D.Md.), *judgment aff'd per curiam*, 379 U.S. 27, *reh. denied*, 379 U.S. 940 (1964)] . . . Hence, the differing treatment is the consequence not of legislative determinations but of constitutional distinctions.

App. A at 53. While this analysis may be dispositive of the claim made in *Alexander*, it *cannot* determine the equal protection claim in *Adams* for, if brought to bear on the claim in *Adams*, the analysis merely begs the question presented.

The "distinctions between the manner in which Congress has exercised its authority over the enclaves and the District" are challenged in *Adams* because *Adams* shows that these are *legislative*, *not* constitutional distinctions. As *Adams* demonstrated in the Record (uncontroverted by the Defendants/Appellees), half a century ago, millions of people outside the District of Columbia were deemed *not to be* State citizens precisely because Congress exercised over *them* the same power it still exercises over the District. *See* U.S. Dept. of Justice, Land and Natural Resources Div., *Federal Legislative Jurisdiction*, 67-68 (1969). In short, *all* people over whom Congress exercised the power of exclusive legislation were excluded from apportionments as "a consequence of Article I," but Congress legislatively *changed* that distinction. *See, e.g., Langdon v. Jaramillo*, 80 N.M. 255, 454 P.2d 269, 271 (1969) ("The *legislative action* necessary to confer state jurisdiction over the area of the federal enclave . . . is by an act of the Congress." (emphasis added)).

Adams asserts that District residents' rights to equal treatment are *violated by* the differential treatment of the enclaves as compared to the District of Columbia. To suggest that this question is settled by the differential treatment *itself*

(*see* App. A at 46-47 n.52 ("the difference in the way in which Congress has exercised its authority over enclaves and the District distinguishes this case from *Evans*") & at 53) merely begs the question whether there is a compelling governmental reason for the differential treatment at issue.

As the issue was argued in *Adams* below, Article I of the Constitution certainly defines who may be included in apportionments for congressional representation, but Article I of the Constitution doesn't define *who* – of all the people over whom Congress has the power of exclusive legislation – *is or is not* included among the citizens of the states. If Congress has allowed all but those in D.C. to be actual citizens of the states, then why not those in D.C.?

The court's reference to *Albaugh* is telling, however, for *Albaugh* teeters on the brink of the rift in the law of "exclusive legislation." *Albaugh* is based, entirely, upon *Reily v. Lamar*, *see supra* at p. 6. 233 F.Supp. at 578. The doctrine expressed in *Reily* was directly countermanded, however, in *Howard v. Commissioners of Sinking Fund*, *see supra* at p. 6. Unless the rift is repaired, either *Albaugh* and its ilk fall or *Howard* and its progeny (including *Evans v. Comman*, *supra*) fall. The court below ignored the jeopardy and lost a chance to repair the rift by adopting the arguments presented in *Adams*.[9]

Overall, it's not clear from the Three-judge District Court's memoranda whether the court concluded that, for extra-constitutional reasons, the residents of the District of Columbia are not entitled to the equal protection of the laws or equal treatment as compared to all other people over whom Congress has identical constitutional powers or whether, in reaching its conclusion on the claims in *Alexander*, the court merely ignored the arguments and

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[9] The majority below did address one aspect of *Adams* with contextually sufficient accuracy. In footnote 63 (App. A at 54), the majority refers to *Adams*' equal protection claim(s) concerning local governance of the District, but these claims were remanded to the single judge (so are not on appeal here). There's no indication why the court didn't carry over its apparent understanding of the(se) claim(s) to the apportionment context.

evidence in *Adams*. It's as if the claims, arguments, and evidence presented in *Adams* evaporated, leaving behind only the name of the case and judgment against it.

This failure to treat *Adams v. Clinton* as a distinct case gives rise to the second, *provisional* question on appeal. If the Court has any doubt about its jurisdiction or the merits of this appeal, the proper course is to reverse the District Court's judgment on *Adams* and remand *Adams* for full analysis of its unique claims, arguments, and evidence. On the other hand, these questions, ultimately, must be analyzed and answered here. The Record from below can be reconstituted[10] and the legal issues addressed *de novo*.

For the most part, Appellants agree with the substance of the Three-Judge District Court majority's analysis of the claims and arguments presented in *Alexander v. Daley* and, while the dissent's memorandum is encouraging in many ways, Appellants respectfully disagree with Judge Oberdorfer that Congress can legislatively define the District as a state for the purposes of Article I of the Constitution and representation in Congress (App. C at 24-49, 62).[11] Thus, the dissent does not speak for or upon the merits of *Adams v. Clinton* and the majority certainly does not dispose of the claims or arguments of *Adams v. Clinton*.

The District Court nevertheless entered judgment dismissing all claims and demands in *Adams v. Clinton* concerning apportionment of representation in Congress, including dismissing the Plaintiffs'/Appellants' demand for injunctions (App. B).[12] Thereupon, Plaintiffs

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[10] The docket misidentifies which parties filed various documents in each case and the docket (wrongly) names an attorney associated with counsel for *Alexander* Plaintiffs as co-counsel for *Adams* Plaintiffs.

[11] *Adams* would argue that Congress cannot "define" a place as a "State" (or part of a State) when the place *is not* a State (or a complete, actual part of a State) and when such definition would allow that place to perform or participate in a purpose or function defined in the Constitution.

[12] Judge Oberdorfer entered judgment on claims in the

below filed their Notice of Appeal (App. H).[13]

DISCUSSION

A: The Court has Jurisdiction over this Appeal under 28 U.S.C. § 1253

The Court has jurisdiction over this case under 28 U.S.C. § 1253, which provides that "any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

This case was filed and Appellees were served process on June 30, 1998. Appellees filed Motions to Dismiss in lieu of answers on or about September 18, 1998. These Motions, along with Appellants' Motion for Summary Judgment, were heard in oral argument before a Three-Judge District Court on April 19, 1999. On March 20, 2000, the Three-judge District Court entered an order granting the Motions to Dismiss filed by Appellees with regard to Petitioners' claims concerning apportionment of congressional districts. The relief demanded against Appellees included permanent injunctions (App. F at 24-27) , so dismissal of Appellants' claims against Appellees (App. B) necessarily entailed denial of those permanent injunctions.[14] Thus, this appeal (App. H) is from an order denying permanent injunctions after notice and hearing, leaving the question whether the issues on appeal were required to have been heard and determined by "a district court of three judges."

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remanded portion of the case on March 20 and April 27, 2000.

[13] Plaintiffs in the companion case, *Alexander, et al., v. Daley, et al.*, also appealed from the judgment of the Three-judge District Court. They filed their *Jurisdictional Statement* on June 23, 2000, Case No. 99-2062.

[14] The Three-judge District Court's order disposed of all issues before that Court, so this appeal is not interlocutory.

B: *Adams* was Properly before a Three-Judge District Court under 28 U.S.C. § 2284(a)

Under 28 U.S.C. § 2284(a), "[a] district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts[.]"[15] Section 2284 is jurisdictional; "the 'shall' language of the statute . . . make[s] the convening of such a court a jurisdictional requirement once it becomes clear that there exists a nonfrivolous constitutional challenge to the apportionment of a [congressional district.]" *Armour v. State of Ohio*, 925 F.2d 987, 989 (6th Cir. 1991) (en banc); *Cf. McLucas v. DeChamplain*, 421 U.S. 21, 28 (1975). Direct appeal to the Supreme Court is appropriate and the appeal should be heard on the merits when the constitutional claim is substantial and not obviously frivolous or wholly without merit. *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 148 (1980); *Goosby v. Osser*, 409 U.S. 512, 518 (1973).

1: *Adams* Presents a Constitutional Challenge to Apportionment of Congressional Districts under the Terms of Section 2284(a)

Generally, apportionment is the division of the population of a given polity into constituencies whose members are charged with the selection of representatives to govern the polity. In short, it's "the process of granting of representation to a citizen or a group of citizens[,]" Alfred de Grazia, *General Theory of Apportionment*, 17 Law and Contemporary Problems 256, 256-57 (1952), by designation of the geographic districts which will send representatives to a legislative body, R.K. Scher, J.L. Mills, & J.J. Holating, *Voting Rights and Democracy; The Law and Politics of Districting*, 4-6 (1997). Apportionment, in short, is about drawing lines and it necessarily involves the questions of *who* draws the lines and *who* is on each side of each line.

The Constitution of the United States provides that "[t]he House of Representatives shall be composed of Members

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[15] The entirety of Section 2284(a) is reproduced in App. E.

chosen every second Year by the People of the several States[.]" Art. I, § 2, cl. 1. The Fourteenth Amendment provides that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." Sect. 2. These provisions, taken together, *define* the United States House of Representatives as the product of the apportioned votes of the citizens of the States. Conversely, no one who is not a citizen of a State is entitled to be included in apportionment of congressional districts. *See Oregon v. Mitchell*, 400 U.S. 112, 124, 147-50, 213-16, 237-40, 285-92 (1970) (per Black, J., Douglas, J., Harlan, J., Brennan, J., & Stewart, J.); *see also de la Rosa v. United States*, 32 F.3d 8, 10 (1st. Cir. 1994), *cert. denied*, 514 U.S. 1049 (1995).

While these constitutional provisions are the foundation of apportionment of congressional districts, Congress has a number of powers which have significant and direct impact on apportionments. Textually, the Constitution allows Congress to "make or alter" regulations governing the "Times, Places and Manner of holding Elections[,]" U.S. Const., art. I, § 4, and it's accepted that Congress has ultimate control of the "apportionment process" itself. *See Franklin v. Massachusetts*, 505 U.S. 788, 791-92 (1992); *U.S. Dept. of Commerce v. Montana*, 503 U.S. 442, 448-55 (1992). To allocate seats in the House of Representatives to the States, Congress settled on a mathematical formula called "the method of equal proportions." 2 U.S.C. § 2b; Lawrence F. Schmeckebier, *The Method of Equal Proportions*, 17 Law and Contemporary Problems 302 (1952). This formula satisfies the constitutional criteria that the number of Representatives not exceed one for every 30,000 persons, that each State shall have at least one Representative,[16] and that district boundaries shall not cross State boundaries between the States, *Dept. of Commerce, supra*, 503 U.S. at 448, and, as

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[16] Each State shall have as many congressional districts as it has been apportioned Representatives. 2 U.S.C. § 2c (printed in App. E).

closely as possible, that apportionment of congressional seats will conform to the principle of "one person, one vote," *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964).

To make the process "self executing" (so Congress doesn't have to engage in fierce partisan battles every ten years), *Franklin, supra*, 505 U.S. at 791-92, Congress has charged the President with ministerial task of making the proper calculations according to Congressional dictates. 2 U.S.C. § 2a(a); *Franklin, supra*, 505 U.S. at 798-99. The Clerk of the House (or Sergeant at Arms, when the Clerk is unable to discharge the duty) is charged to notify the governors of each State of the apportionments calculated by the President, 2 U.S.C. § 2a(b), and to make and keep a roll of the duly-elected Representatives, 2 U.S.C. § 26. Finally, the Sergeant at Arms is charged to allow no one onto the floor of the House itself but those Representatives on the roll. *See* Rules IV.3 & IV.4 of the United States House of Representatives.

But Congress's charge to the President and the enumerations reported back to the Clerk and so on all assume certain preexisting, defined places in which people are to be counted: the States. And with regard to what places are States or parts of States, Congress has other powers which have great, cumulative impact on apportionments.

Specifically, Congress has the power "[t]o *exercise* exclusive Legislation in all Cases whatsoever, over [the District of Columbia and] over all Places purchased by the Consent of the Legislature of the States in which the Same shall be," U.S. Const., art I, § 8, cl. 17 (emphasis added), and Congress has identically plenary power over the continental Territories, U.S. Const., art. IV, § 3, cl. 2. Also, Congress has the power to admit new states into the Union, U.S. Const., art. IV, § 3. The net effect of these provisions as they relate to apportionment of congressional districts is that Congress can increase *the number* of "the several States" (as the phrase is used in Article I, § 2) and Congress can adjust *the number of people within* "the several States."

Indeed, since the original thirteen states ratified the Constitution, all other states were *admitted* by Congress and

the political size of all other states has been *expanded* by Congress. *See supra* at 7-9. Thus, Congress has held a remarkable power to decide *who* is included among "the People of the various States" *under* (not just "for the purposes of") Article I of the Constitution.

So long as Congress held land as "Territory," *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542-43 (1828), or held land under the plenary power of "exclusive Legislation," *Reily, supra*, 6 U.S. at 356-57; 1 JOFAWS 19-20, 54-55; 2 JOFAWS 242-43, those places were not States or parts of States. Thus, the people who lived in all these places were not "People of the several States," U.S. Const., art. I, § 2, entitled to be included in apportionments of congressional districts. *See, e.g., Fed. Legislative Jurisdiction, supra* at 67-68. Then, for each categorical subject of congressional power *other than* the District of Columbia, Congress *opted* to admit the Territory as a State. *See, e.g.*, Pub. L. No. 85-508, 72 Stat. 339 (1958); Pub. L. No. 86-3, 73 Stat. 4 (1959). Congress *opted* to end its absolutely "exclusive" jurisdiction over the federal enclaves and allow the States to incorporate the enclaves politically and legislatively. *See Comman, supra*, 295 F.Supp. at 657-59. Congress *opted* to wholly retrocede its jurisdiction to a State. Act of July 9, 1846, 9 Stat. 35, ch. 35; *Phillips v. Payne*, 92 U.S. 130 (1876).[17]

Finally, once Congress opted to admit the Territories as States, to allow the States to exercise State authority within the federal enclaves, and to allow Virginia to reincorporate

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[17] It might also be observed that, in many situations, the *same* lines drawn by Congress which resulted in apportionment to a place of seats in the House *also* resulted in representation of the same place in the *Senate*. This happens when the place is a newly-admitted *State*. So while apportionment is intrinsic to representation in the House, *sometimes* it's conducive to representation in the Senate as well. Either way, apportionment and representation are the primary constitutional insurance that the Congress of the United States itself will be a "republican form of government." U.S. Const., art. IV, § 4; *Reynolds v. Sims*, 377 U.S. 533, 582, *reh. denied*, 379 U.S. 870 (1964).

the former portion of the District south-west of the Potomac River into Virginia, these places were either States or parts of States *for all purposes*. The net result is that, presently, Congress has decreed that there be 435 geographic districts which each shall elect a representative to the United States House of Representatives, *see* Act. of Aug. 8, 1911, Pub. L. 62-5, ch. 5, 37 Stat. 13 (1911); Emanuel Celler, *Congressional Apportionment– Past, Present, and Future*, 17 Law and Contemporary Problems 268, 271 (1952), and all places now or ever before under Congress' power of "exclusive legislation," *except* the District of Columbia, are now included in those 435 districts. The most densely populated half of one of those districts is the former portion of the District of Columbia retroceded to Virginia in 1846. Today, the citizens who reside in what was called Alexandria County when it was a part of the District of Columbia, Green, *Washington; Village and Capital, supra*, at 26-27, are apportioned representation in the Eighth Congressional District of the Commonwealth of Virginia.

But while Congress has apportioned representation to all other areas to which the District of Columbia might be compared as a subject of the powers of Congress under the Constitution, the residents of the District of Columbia are completely "fenced out" of presently defined apportionments. *See Carrington v. Rash*, 380 U.S. 89, 94 (1965). Congress has denied the residents of the District of Columbia "access to the political process equal to the access of other groups." *Chapman v. Meier*, 420 U.S. 1, 17 (1975). Their opportunity to exercise the franchise is completely denied. *Kramer v. Union Free School District*, 395 U.S. 621, 626-27 (1969); *see also Davis v. Bandemer*, 478 U.S. 109, 133 (1986); *Rosario v. Rockefeller*, 410 U.S. 752, 756-57 (1973).

The residents of the District of Columbia are in a position worse than that of the plaintiffs in *Baker v. Carr*, 369 U.S. 186 (1962), where a defined group voters in Tennessee had no "*practical* opportunities for exerting their political weight at the polls" *id.* at 258-59 (Clark, J., concurring; emphasis added). In contrast, the citizens of the District of Columbia

have *no opportunities*– practical or otherwise–for exerting their political weight in Congress. Likewise, Appellants are in a worse position than the aggrieved plaintiffs in *Reynolds v. Sims, supra,* which challenged apportionments in Alabama which *diluted* the weight of the plaintiffs' population group. Ruling in favor of the plaintiffs there, the Court said "the right of suffrage can be denied by a *debasement or dilution* of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.*, 377 U.S. at 555 (emphasis added). Just so, in strict comparison to its treatment of all other places over which Congress exercises the power of "exclusive legislation" under the Constitution, Congress has singled out this sixty-seven square mile area in which over a half-million people live and "deprive[d it] of the ballot *altogether*." *Avery v. Midland County, Texas*, 390 U.S. 474, 481 n.6 (1968) (emphasis added).

Adams complains of a situation where a discrete geographic area elects *no one* while other, similarly-situated areas are included in apportionments. When the government of a jurisdiction provides that its component representatives be elected by the citizens of the jurisdiction, each citizen "has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Kramer, supra*, 395 U.S. at 626-29; *Gray v. Sanders*, 372 U.S. 368, 379-80 (1963).

If a deviation of 78% between areas violates constitutional principles, *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 702 (1989), if a deviation of even 26% between areas violates constitutional principles, *Swann v. Adams*, 385 U.S. 440 (1967), then a deviation of 100% between areas subject to the power of the sovereign cannot be justified and should be strictly scrutinized by the Court. An apportionment of congressional districts under which the residents of one discrete geographic place are "denied access to the political process equal to the access of other groups" represented in the legislature which rules them all, *Chapman, supra*, 420 U.S. at 17, where the voting strength of that discrete population is "minimized or *canceled out*," *Fortson v. Dorsey*, 379 U.S. 433,

439 (1965) (emphasis added), where the citizens have been systematically and perpetually "'[*f*]*enc*[*ed*] out' from the franchise," *Carrington, supra*, 380 U.S. at 94 (emphasis added), the scheme of apportionment is presumptively invalid.

The evidence submitted in the Record below and the law shows that the rights of the citizens of the District of Columbia to treatment equal to that enjoyed by all other people over whom Congress holds or has held identical constitutional powers are violated. To answer that the District simply is not a State or part of a State (which *Adams* admits and asserts as an element of the case) is only to beg the question *why* all *other* people who live in places subject to identical powers of congress *are* living in States or parts of States, while the citizens of the District of Columbia languish.

2: The Constitutional Questions Presented are Substantial

A constitutional claim is substantial unless it is either "obviously without merit or . . . its unsoundness so clearly results from previous decisions . . . as to foreclose the subject." *Bailey v. Patterson*, 369 U.S. 31, 33 (1962). In determining whether a case was properly before a three-judge district court, "claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial[.]" *Goosby, supra*, 409 U.S. at 518; *accord Ex parte Poresky*, 290 U.S. 30, 32 (1933).

If the precise issues raised in *Adams* have not been decided by the Court, then the questions are not "constitutionally insubstantial" or foreclosed. Certainly, any question which has *never* been raised, much less analyzed, cannot have been settled or deemed "answered."

No opinion of the Court precludes the claims made in *Adams*. While the Court has issued a number of opinions concluding that the District of Columbia is separate from the States, *see, e.g., Palmore v. United States*, 411 U.S. 389, 395

(1973); *National Mutual Ins. Co. of Dist of Col. v. Tidewater Transfer Co.*, 337 U.S. 582, 587-88 (1949); *Metropolitan R. Co. v. District of Columbia*, 132 U.S. 1, 9 (1889); *Hepburn and Dundas v. Ellzey*, 6 U.S. (2 Cranch) 445, 452-53 (1804); *Reily, supra*, 6 U.S. at 356-57, the Court has never addressed the stark equal protection question presented in *Adams v. Clinton*. Even the Memorandum of the Three-judge District Court below (App. A) does not preclude the claims made in *Adams*, for its analysis is devoted to entirely different claims made in *Alexander*.

Also, the Court has never addressed the rift which opened in *Howard v. Commissioners of the Sinking Fund, supra*, leaving the District of Columbia as the only place under the now-aberrant "extraterritorial" doctrine first enunciated in *Reily v. Lamar, supra*, and perpetuated for the next 150 years. Thus, the Court is presented with a question of first impression in *Adams*.

3: The Court Has the Power to Provide Equitable Relief

Adams presents a substantial, justiciable claim for equitable relief and the relief demanded would result in reapportionment. *See Karcher v. Daggett*, 462 U.S. 725, 730-31 (1983); Wright, Miller & Cooper, *Federal Practice and Procedure*; Jurisdiction 2d § 4235 at 606. Injunctions barring or prohibiting the Appellees from reporting apportionments which do not include the residents of the District of Columbia would end the discriminatory treatment complained of in the case. More positively, as happened in *Baker v. Carr, supra*, and in *Reynolds v. Sims, supra*, such injunctions would leave open the field of political movement required of the citizens of the District and of the political branches of the federal government to place the District of Columbia in a position where the citizens would be constitutionally qualified to be included in apportionments of congressional districts.

While Congress has plenary power to govern the District, *Palmore, supra*, 411 U.S. at 397-98, the power is not unlimited by the Constitution, *id*; *National Mutual Ins. Co., supra*, 337

U.S. at 602. The District/Enclaves Clause does not render the entire remainder of the Constitution "unconstitutional." The Court can and should restrain violations of constitutionally guaranteed rights, even when the violations occur as a result of grants of plenary power. And since "[t]he history of apportionment in the United States . . . indicates conclusively that the one single factor that has always been lacking has been that of enforcement[,]" Celler, *supra*, 17 Law and Contemporary Problems at 275, the Court is only providing what the legislature at issue – Congress – has not.

C: Compelling Equitable Considerations Augur in Favor of Noting Jurisdiction

Any question whether Congress intended a case such as this one to fall under the provisions of 28 U.S.C. § 2284(a) must be resolved in Appellants' favor. The plain language of the Act and construction of the Act by the courts covers the issues and claims in *Adams*, howsoever unique those issues and claims might be among all "usual" apportionment cases. *See* Wright, Miller & Cooper, *supra*, at 606.

Also, it must be noted that the present, final *government* of the District of Columbia is Congress itself. By fencing the District off from the rest of the country, Congress has retained for itself a laboratory for experiments it could not authorize elsewhere. The courts should be strictly critical of any scheme which so protects the parochial power and interests of the governmental body primarily responsible for the scheme. *See League of Women Voters v. Diamond*, 965 F.Supp. 96, 101 (D. Me. 1997) ("If the election law in question has the effect of immunizing the current leadership at the expense of new or minority views, the Court's precedent demonstrates little tolerance. Such laws are subjected to strict scrutiny and, generally, held unconstitutional.").

Finally and most importantly, the rift in a doctrine which once was uniform is a cogent reason to note jurisdiction of *Adams* and analyze the issues in detail. While the most egregious results of the rift give rise to *Adams v. Clinton*, sporadic problems also destabilize the lives of all people

subject to Congress' powers of "exclusive legislation."[18] *Adams* presents a coherent analysis which resolves the doctrine of Congress' power of exclusive legislation.

CONCLUSION

For these reasons, the Court should note jurisdiction of this appeal.

But if the Court doubts its jurisdiction over this appeal or is inclined to affirm the lower court on the basis of the lower court's analysis, the appropriate course is to reverse the judgements entered by the Three-judge District Court in this case on March 20, 2000 and remand the case to the Three-judge District Court for reconsideration on the case's merits without reference to the claims, arguments, or demands made in *Alexander v. Daley*. To enable the Three-judge District Court to do this on the basis of all claims, arguments, and evidence submitted *Adams*, the Court should also reverse all subsequent judgments of the single District Judge entered on March 20 and on April 27, 2000. Finally, to insure that the court below has an accurate Record for analysis, Appellants request a writ of mandamus under 28 U.S.C. § 1651(a), directing the Clerk of the District Court to reconstitute the official record in *Adams v. Clinton*, eliminating from the Record all documents not filed by the Plaintiffs in *Adams*, by the original Defendants in *Adams* (addressing the merits of *Adams*), or by the *amici curiae* American Friends Service Committee, the D.C. Statehood-Green Party, Shadow Senator Strauss, the Committee for the Capital City, and the Eleven Law Professors.

Respectfully submitted,
George S. LaRoche,
Adams' Counsel of Record

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[18] *See* Castlen & Block, *supra*, n. 3; Malinowski, *supra*, p. 5; Richard T. Altieri, *Federal Enclaves: The Impact of Exclusive Legislative Jurisdiction Upon Civil Litigation*, 72 Mil. L. Rev. 55 (1976).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOIS E. ADAMS, *et al.*, Plaintiffs, v. WILLIAM JEFFERSON CLINTON, *et al.*, Defendants.	)	Civ. No. 98–1665 (LFO, MBG, CKK)
CLIFFORD ALEXANDER, *et al.*, Plaintiffs, v. WILLIAM M. DALEY, *et al.*, Defendants.	)	Civ. No. 98–2187 (LFO, MBG, CKK)

MEMORANDUM OPINION

FILED
Mar[ch] 20, 2000
Nancy Mayer-Whittington, Clerk
U.S. District Court

Before: GARLAND, *Circuit Judge*, and OBERDORFER and KOLLAR-KOTELLY, *District Judges*.

Per Curiam opinion for the Court filed by *Judges* GARLAND and KOLLAR-KOTELLY, in which *Judge* OBERDORFER joins as to Parts I, II, and III.

OBERDORFER, *District Judge*, filed an opinion dissenting in part.

PER CURIAM: In these consolidated lawsuits, seventy-five residents of the District of Columbia, along with the District of Columbia itself, challenge as unconstitutional the denial of their right to elect representatives to the Congress of the United States. Plaintiffs argue that their exclusion from representation is unjust. They note that the citizens of the

District pay federal taxes and defend the United States in times of war, yet are denied any vote in the Congress that levies those taxes and declares those wars. This, they continue, contravenes a central tenet of our nation's ideals: that governments "deriv[e] their just powers from the consent of the governed." THE DECLARATION OF INDEPENDENCE para. 2.

None of the parties contests the justice of plaintiffs' cause. President Clinton and the other defendants, however, maintain that the dictates of the Constitution and the decisions of the Supreme Court bar us from providing the relief plaintiffs seek. Any such relief, they say, must come through the political process.

Plaintiffs' grievances are serious, and we have given them the most serious consideration. In the end, however, we are constrained to agree with defendants that the remedies plaintiffs request are beyond this court's authority to grant.

I

On June 30, 1998, D.C. resident Lois Adams and nineteen co-plaintiffs filed suit in *Adams v. Clinton*. Their complaint alleges that the failure to apportion congressional representatives to the District, and to permit District residents to vote in House and Senate elections, violates their constitutional rights to equal protection of the laws and to a republican form of government. They further contend that those same rights are violated by Congress's exercise of exclusive jurisdiction over the District, and by its denial to plaintiffs of "a state government, insulated from Congressional interference in matters of local concern." *Adams* Compl. ¶ 109. In connection with the latter claim, they seek an injunction directing the District of Columbia Financial Responsibility and Management Assistance Authority, commonly known as the "Control Board,"[1] to "take no further action" and to "disband itself." *Id.* at 28. The *Adams* complaint names as defendants President William Jefferson

[1] The Control Board was established pursuant to the District of Columbia Financial Responsibility and Management Assistance Act, Pub. L. No. 104-8, 109 Stat. 97 (1995).

Clinton, the Clerk and the Sergeant at Arms of the House of Representatives, and the Control Board.

On September 14, 1998, District of Columbia resident Clifford Alexander, fifty-six other residents of the District, and the District itself filed suit in *Alexander v. Daley*. Like their counterparts in *Adams*, the *Alexander* plaintiffs allege that their inability to vote for representatives and senators violates their rights to equal protection and to a republican form of government. The *Alexander* plaintiffs also allege that the denial of congressional representation violates their right to due process and abridges their privileges and immunities as citizens of the United States. Finally, they contend that the denial of their right to vote violates Article I and the Seventeenth Amendment of the Constitution, which provide that the members of the House shall be chosen by "the People of the several States" and that senators shall come "from each State, elected by the people thereof." U.S. CONST. art. I, § 2, cl. 1; *id.* amend. XVII, cl. 1. The *Alexander* complaint names as defendants Secretary of Commerce William M. Daley; the Clerk, the Sergeant at Arms, and the Chief Administrative Officer of the House of Representatives; the Secretary and the Doorkeeper/Sergeant at Arms of the Senate; and the United States.

On November 3, 1998, a single-judge district court consolidated the two lawsuits. *See Adams v. Clinton*, Civ. No. 98–1665 (D.D.C. Nov. 3, 1998) (Oberdorfer, J.). On November 6, that court granted motions by both sets of plaintiffs to appoint a three-judge district court pursuant to 28 U.S.C. § 2284(a), which provides that "[a] district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts." *See Adams v. Clinton*, 26 F. Supp.2d 156, 160 (D.D.C. 1998) (Oberdorfer, J.). This court subsequently convened, disposed of certain preliminary motions, *see Adams v. Clinton*, 40 F. Supp.2d 1, 5 (D.D.C. 1999), and heard oral argument.

Currently pending are motions to dismiss or for summary judgment on behalf of each of the parties. All parties agree

that the consolidated lawsuits contain no genuine issue as to any material fact and that decision on the pending motions is appropriate. We first address whether all of the claims disputed in these motions are properly before this three-judge panel. We then address the standing of plaintiffs to pursue those claims that are properly before us. Finally, we examine the merits of those claims.

II

The parties have not asked us to revisit the original judge's determination that this case falls within the confines of the three-judge court statute, and we will not do so insofar as the complaints allege the failure to apportion members of the House of Representatives to the District. We have, however, determined that this court should relinquish jurisdiction over the other claims raised in the complaints and pending motions. These include both complaints' demands for representation in the Senate, which, because they do not "challeng[e] the constitutionality of the apportionment of congressional districts," plainly fall outside the jurisdictional mandate of section 2284(a). They also include the *Adams* plaintiffs' challenges to Congress' continuing exercise of exclusive authority over matters of local concern, particularly their challenge to the existence of the Control Board. Although these claims involve some issues akin to those found in the representation claims, they do not directly challenge congressional apportionment and therefore also fall outside the language of section 2284(a). *Cf. Public Serv. Comm'n v. Brashear Freight Lines, Inc.*, 312 U.S. 621, 625 (1941) (holding that three-judge court should not consider "questions not within the statutory purpose for which the two additional judges ha[ve] been called").

Not only do the aforementioned claims fall outside the scope of section 2284(a), but they are also not the type of claims over which three-judge courts commonly assert supplemental jurisdiction. *See generally Allee v. Medrano*, 416 U.S. 802, 812 (1974) (indicating that three-judge courts may assert ancillary jurisdiction over certain non-three-judge

claims); *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 504 n.5 (1972) (same). For example, it is not necessary to resolve the Senate and Control Board claims in order to provide a "final and authoritative decision of the controversy" among the parties involved in the apportionment claims. *Public Serv. Comm'n*, 312 U.S. at 625 n.5; *see also Allee*, 416 U.S. at 812 n.8. Nor is this a case in which resolution of the non-three-judge claims would allow us to dispose of the claims that provide the basis for our jurisdiction. *See Allee*, 416 U.S. at 812 n.8; *United States v. Georgia Pub. Serv. Comm'n*, 371 U.S. 285, 287-88 (1963) ("Once [a three-judge court has been] convened the case can be disposed of below or here on any ground, whether or not it would have justified the calling of a three-judge court."); *see also Rosado v. Wyman*, 397 U.S. 397, 402 (1970) (stating that three-judge court must decide non-constitutional claims "in preference to deciding the original constitutional claim" for which court convened).

Because the claims that do not directly challenge the apportionment of representatives do not implicate the concerns that have traditionally caused three-judge courts to exercise supplemental jurisdiction, it may be improper for us to exercise such jurisdiction over them. *Cf. Perez v. Ledesma*, 401 U.S. 82, 86-87 (1971) (holding that three-judge court convened to hear challenges to certain state laws did not have jurisdiction over related attack on similar local ordinance). Even if our jurisdiction over those claims were proper, however, we would retain the discretion not to exercise it. *See Turner Broad. Sys., Inc. v. FCC*, 810 F. Supp. 1308, 1314 (D.D.C. 1992) (three-judge court). As we noted at an earlier stage in these proceedings, the Supreme Court has indicated that "even when [a] three-judge court has jurisdiction over [an] ancillary claim, 'the most appropriate course' may be to remand it to [a] single district judge." *Adams*, 40 F. Supp.2d at 5 (quoting *Hagans v. Lavine*, 415 U.S. 528, 544 (1974)); *see also Diven v. Amalgamated Transit Union Int'l & Local 689*, 38 F.3d 598, 601 (D.C. Cir. 1994).

Remand of the non-apportionment claims is the appropriate course here. There is no doubt that resolution of

the Senate and Control Board claims would take us far afield from the core of the original jurisdictional grant, and at the same time deprive the Court of Appeals of the opportunity to review our work. *See* 28 U.S.C. § 1253 (providing that final judgment of three-judge district court is appealable directly to Supreme Court). To avoid reaching "constitutional questions we need not reach, asserting authority we may not have," *Adams*, 40 F. Supp.2d at 5, we will address here only those claims that challenge the constitutionality of an apportionment of congressional districts that fails to account for the District of Columbia and its residents. The balance of the claims are remanded for determination by the single district judge before whom they were originally filed.

III

Before reaching the merits of the claims for representation in the House, we must determine two further questions regarding our jurisdiction: whether plaintiffs' challenge represents a nonjusticiable political question, and whether plaintiffs have the requisite standing to bring it. *See Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1012 (1998) (holding that Article III courts must consider jurisdictional questions before deciding merits of causes of action).

A

The defendant House officials contend that this case presents a nonjusticiable political question because there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr*, 369 U.S. 186, 217 (1962). Specifically, they assert that because Article I of the Constitution limits voting to residents of the fifty states, only congressional legislation or constitutional amendment can remedy plaintiffs' exclusion from the franchise.

We do not agree that the political question doctrine bars our consideration of this case. The Supreme Court has repeatedly declared that "[c]onstitutional challenges to

apportionment are justiciable." *Franklin v. Massachusetts*, 505 U.S. 788, 801 & n.2 (1992) (plurality opinion of O'Connor, J.) (citing *Department of Commerce v. Montana*, 503 U.S. 442 (1992)); *accord Wesberry v. Sanders*, 376 U.S. 1, 6 (1964). The resolution of this dispute is "textually committed" only if we assume before we begin that plaintiffs cannot prove what they allege: that District residents are among those qualified to vote for congressional representatives under Article I. That purely legal issue is one the courts are perfectly capable of resolving, and is similar to those the Supreme Court has repeatedly found appropriate for judicial resolution. *See, e.g.*, *Montana*, 503 U.S. at 458-59 ("[T]he interpretation of the apportionment provisions of the Constitution is well within the competence of the Judiciary. The political question doctrine presents no bar to our reaching the merits of this dispute . . . .") (citations omitted); *Baker*, 369 U.S. at 226.

B

Next, we consider plaintiffs' standing to bring these consolidated actions. The Supreme Court has summarized the requirements for standing as follows:

> [T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (footnote, citations, and internal quotations omitted). For the purposes of standing analysis, we "assume the validity of a plaintiff's substantive claim." *Catholic Soc. Serv. v. Shalala*, 12 F.3d 1123, 1126 (D.C. Cir. 1994); *accord Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is

illegal . . . ."); *Claybrook v. Slater*, 111 F.3d 904, 907 (D.C. Cir. 1997); *United States House of Representatives v. United States Dep't of Commerce*, 11 F. Supp.2d 76, 83 (D.D.C. 1998) (three-judge court), *appeal dismissed*, 119 S. Ct. 765 (1999).

Defendants do not seriously dispute that plaintiffs' lack of representation in the House satisfies the "injury in fact" requirement. *See* Tr. of Mot. Hr'g at 70. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry*, 376 U.S. at 17 (invalidating malapportioned congressional districts). Hence, if the residents of the District are entitled to such a voice -- which we must presume for purposes of standing analysis -- its denial plainly constitutes an "injury in fact." *See Department of Commerce v. United States House of Representatives*, 119 S. Ct. 765, 774 (1999) (holding that resident's "expected loss of a Representative to the United States Congress" through reapportionment "undoubtedly satisfies the injury-in-fact requirement of Article III standing"); *Michel v. Anderson*, 14 F.3d 623, 626 (D.C. Cir. 1994) (noting that "[i]t is obvious that Georgia voters would have suffered an injury" if "the House were to prevent all congressmen from the State of Georgia from voting in the House").

Defendants focus instead on the second and third prerequisites of standing: the requirements of causation and redressability. That analysis in turn, focuses on the statutory process for apportionment of congressional districts. The Secretary of Commerce is required, within nine months of completing the decennial census, to report to the President the total population of each state for purposes of congressional apportionment. *See* 13 U.S.C. § 141(b).[2] Upon receiving the report, the President must transmit to Congress "a statement showing the whole number of persons in each

[2] The statute provides:

> The tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States shall be . . . reported by the [Commerce] Secretary to the President of the United States.

13 U.S.C. § 141(b).

State . . . and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives." 2 U.S.C. § 2a(a). "Each State shall be entitled . . . to the number of Representatives shown" in the President's statement, and within fifteen days of receiving that statement, the Clerk of the House must "send to the executive of each State a certificate of the number of Representatives to which such State is entitled . . . ." *Id.* § 2a(b); *see Franklin*, 505 U.S. at 792. The Secretary concedes that he has not included, and does not plan to include, a separate entry for the District of Columbia in his report to the President. Nor has he included, nor does he plan to include, the District's population within that of any state.

With respect to causation, the Secretary of Commerce and the Clerk of the House contend that they bear no individual responsibility for the exclusion of the District from the apportionment process because they are merely carrying out the constitutional requirement (repeated *in haec verba* in the statute) that representatives be apportioned "among the several States,"[3] and because the District of Columbia is not a state. This argument once again assumes that plaintiffs will not prevail on the merits. We, however, must assume here that plaintiffs will prevail, and hence that the District *is* a "state" for apportionment purposes and that the Constitution is not the cause of their electoral disability.

The more difficult standing question is that of redressability. Secretary Daley contends that even if we may order him to include the District's citizens within his report,[4] the President is not bound to accept that report. He further argues that we are without power to enjoin the President if he refuses to adhere to a declaration in plaintiffs' favor. Making an analogous argument, the Clerk of the House contends that

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[3] U.S. CONST. art. I, § 2, cl. 3; 13 U.S.C. § 141(b); *see supra* note 2.

[4] *See Franklin*, 505 U.S. at 802 (plurality opinion of O'Connor, J.) (noting that "injunctive relief against executive officials like the Secretary of Commerce is within the courts' power").

the Speech or Debate Clause[5] likewise prevents us from enjoining her should she decide not to comply with our declaration of the law. Defendants argue that, because the chain of causation may be broken in these two places, plaintiffs cannot satisfy the requirement of redressability.[6]

We are guided in our resolution of this issue by the Supreme Court's resolution of a similar dispute in *Franklin v. Massachusetts*, which arose out of a three-judge court proceeding pursuant to the same jurisdictional statute at issue here. *See* 505 U.S. at 788. In that case, Massachusetts and two of its residents challenged the method used by the then-Secretary of Commerce for allocating overseas military personnel among the states for apportionment purposes – a method that resulted in Massachusetts losing a seat in the House. *See id.* at 790. The plaintiffs sued the President, the Secretary of Commerce, the Clerk of the House, and Census Bureau officials for violating the Administrative Procedure Act (APA) and the Constitution. As in this case, the defendants contended that the court could not grant injunctive relief against the President, and that absent such relief, a judgment against the remaining defendants would fail to redress the plaintiffs' injury. *See id.* at 802-03.

Although divisions among the Justices make the Court's opinion difficult to parse, it nonetheless appears that eight Justices rejected the contention that the *Franklin* plaintiffs lacked standing. Four Justices agreed with the defendants that, at a minimum, the prospect of an injunction against the President was "extraordinary, and should have raised judicial eyebrows." *Id.* at 802 (plurality opinion of O'Connor, J.). Those four concluded, however, that they could avoid

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[5] U.S. CONST. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place.").

[6] Defendants do not shrink from the implications of their position. As noted at oral argument, their contention would apply with equal force to a President's decision to deny representation to a state that voted against him in the last election (at least if that decision were supported by a majority in Congress). *See* Tr. of Mot. Hr'g at 54. Indeed, the Executive Branch defendants concede that, on their theory, no one would have standing to challenge a presidential decision to *grant* the District the vote simply by apportioning it representatives in his transmission to the Clerk. *See id.* at 54-55.

deciding the propriety of granting relief against the President (or the House officials) because the plaintiffs' injury was likely to be redressed by declaratory relief against the Secretary of Commerce alone. *See id.* at 803. A judgment against the Secretary would be enough to cause her to send the correct numbers, the four Justices thought, and it was fair to assume that the President and the congressional officials would then follow the law as the Court articulated it:

> [A]s the Solicitor General has not contended to the contrary, we may assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision by the District Court, even though they would not be directly bound by such a determination.

Id. Accordingly, the four went on to consider the merits of plaintiffs' constitutional argument, ultimately holding against them. *See id.* at 806.

Four more Justices concurred in the judgment against plaintiffs without addressing standing. They did, however, conclude that the President's role in the apportionment process was strictly ministerial, and thus that the Secretary's report could be challenged as "final agency action" under the APA. *See id.* at 807, 808-17 (Stevens, J., concurring in part). "[T]he statute," these four said, "does not contemplate the President's changing the Secretary's report." *Id.* at 814. Because these four Justices went on to consider (and deny) the merits of the plaintiffs' claims, the sole Justice dissenting on the issue of standing concluded that they had necessarily found it to exist. *See id.* at 823-24 & n.1 (Scalia, J., concurring in part). Even if that was not necessarily so,[7] the view of these four regarding the President's lack of discretion supports plaintiffs' claim of redressability. Since, in the view of these four Justices, the President is without discretion to

[7] *Franklin* preceded *Steel Co.*, in which the Court expressly held that Article III courts must consider jurisdictional questions before deciding whether a plaintiff has stated a cause of action. *See Steel Co.*, 118 U.S. at 1012.

modify the Commerce Secretary's report,[8] the ability of the court to enjoin the Secretary establishes the necessary redressability.

Deriving a governing principle from the opinions of a fragmented Court is always problematic.[9] Nonetheless, we are bound to try to discern such a principle. *Cf. Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .") (internal quotation omitted). In *Franklin*, eight Justices reached one common conclusion: that a judgment directing the Secretary of Commerce to report the population of the states in a specified way would directly affect the apportionment of the House, either because the President would voluntarily abide by it or because the President had no choice but to abide by it.

Although *Franklin* is not identical to the case before us, it is sufficiently analogous to govern our determination of plaintiffs' standing. This case involves the same apportionment statute as that at issue in *Franklin*. The Secretary of Commerce plays the same role here as the Secretary did there, and is equally amenable to suit. Here, as in *Franklin*, neither the President nor the House officials have suggested that they would refuse to follow a decision of this

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[8] *See Franklin*, 505 U.S. at 813 (Stevens, J., concurring in part) ("[T]he President has consistently and faithfully performed the ministerial duty [of relaying the Secretary's figures to the Clerk without modification]. The Court's suggestion today that the statute gives him discretion to do otherwise is plainly incorrect.").

[9] In this case, for example, although the four Justices just cited found the President to have nothing more than a ministerial responsibility with respect to the Secretary's report, a majority of the Court (including the four Justices who found standing) held that the Secretary's decision did not constitute final agency action under the APA because "[the President] is not expressly required to adhere to the policy decisions reflected in the Secretary's report. . . . [I]t is the President's personal transmittal of the report to Congress that settles the apportionment . . . ." *Franklin*, 505 U.S. at 799. The same majority noted that Congress had intended to make the reapportionment process "virtually self-executing, so that the number of Representatives per State would be determined by the Secretary of Commerce and the President without any action by Congress." *Id.* at 792.

court (assuming, of course, that it were upheld on appeal) regarding the apportionment of congressional districts.[10] Hence, we can conclude that plaintiffs satisfy the redressability prong of the standing inquiry and, as in *Franklin*, can do so without deciding whether the President or the Clerk is subject to suit.[11]

The distinction the Executive Branch defendants draw between the two cases is not significant. They contend that unlike *Franklin*, which involved the Secretary's policy decision regarding how the census should count military personnel living abroad, here the Secretary is merely carrying out what he perceives the Constitution to require. As defendants point out, the plurality opinion in *Franklin* observed that "[t]he Secretary certainly has an interest in defending her policy determinations concerning the census" and therefore "has an interest in litigating" the accuracy of reapportionment. *Franklin*, 505 U.S. at 803 (plurality opinion of O'Connor, J.). Because in this case Secretary Daley is not defending one of his own policy decisions, defendants contend that we cannot find he has sufficient stake in the outcome of these suits.

Defendants' argument amounts to a claim that the parties lack the "concrete adverseness" necessary to assure that there is an actual "case" or "controversy" within the meaning of Article III of the Constitution. *See Gollust v. Mendell*, 501 U.S. 115, 125-26 (1991) (quoting *Baker*, 369 U.S. at 204); *Diamond v. Charles*, 476 U.S. 54, 61-62 (1986). That claim is

[10] *See* House Opp'n to Pls.' Mot. for Summ. J. at 5-6 ("Were District residents determined to have the right to elect congressional representatives, there is no doubt that the District would be included in the apportionment process.").

[11] An alternative ground for finding redressability, again without resolving the question of the President's amenability to suit, is contained in the D.C. Circuit's opinion in *Swan v. Clinton*, 100 F.3d 973 (D.C. Cir. 1996). There, the court held that even if "the President has the power, if he so chose, to undercut . . . relief" in the form of an injunction against a subordinate official, the "partial relief [plaintiff] can obtain against subordinate executive officials is sufficient for redressability." *Id.* at 980-81. This, the court said, "simply recogniz[es] that such partial relief is sufficient for standing purposes when determining whether we can order more complete relief would require us to delve into complicated and exceptionally difficult questions regarding the constitutional relationship between the judiciary and the executive branch." *Id.* at 981.

not persuasive. Nothing in *Franklin* suggested that its standing analysis turned on the fact that the Secretary's decision was based on her view of policy rather than law. Although Secretary Daley's decision to exclude District residents is based on his interpretation of what the Constitution (and the statute that follows it verbatim) requires, his interest in and responsibility for defending that interpretation is at least as substantial as his interest in defending his policy judgments. *See* U.S. CONST. art. VI, cl. 3 ("[A]ll executive and judicial Officers, both of the United States and the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . ."). And as we have already concluded that plaintiffs have suffered constitutional "injury in fact" from the denial of their right to vote, the fact that the injury arises out of a dispute of law rather than policy does not deprive them of standing to sue.

Before concluding our standing analysis, we must also consider the fact that the *Adams* plaintiffs, unlike their *Alexander* counterparts, did not name the Secretary of Commerce as a defendant. We do not regard this as fatal to applying *Franklin* to the *Adams* complaint. In *Swan v. Clinton*, this Circuit held that, when necessary to satisfy the redressability component of standing, a court may constructively amend a complaint to include prayers for relief against unnamed defendants in their official capacities who might otherwise be in a position to frustrate the implementation of a court order. *See* 100 F.3d 973, 979-80 & n.3 (D.C. Cir. 1996) (citing, *inter alia*, *United States v. New York Tel. Co.*, 434 U.S. 159, 174 (1977)). Here it is not even necessary to constructively amend the complaint to bring the additional defendant before the court, because the *Alexander* plaintiffs did sue the Secretary, and we have consolidated the two cases. The Secretary is therefore already before us, and his counsel has already raised all of the appropriate arguments on his behalf.

Finally, we must address the question of whether the failure of both complaints to include Maryland election officials as defendants poses an insuperable obstacle to

redressability, given that one proposed remedy is to permit plaintiffs to vote for representatives as if they were citizens of Maryland. Although there is no guarantee that Maryland officials would permit District residents to vote there even if we directed the Secretary to count them as Maryland citizens for purposes of apportionment, the fact that officials who are not parties to these cases are in a position to thwart one of many potential remedies does not defeat our jurisdiction. *See id.* at 980-81. Moreover, plaintiffs point out that if we were to find them to be Maryland citizens for purposes of congressional voting, a remedy could be crafted that would not necessarily rely on Maryland's electoral machinery. *See Alexander* Pls.' Consolidated Mem. in Opp'n to Defs.' Mots. to Dismiss at 35 n.18 [hereinafter *Alexander* Pls.' Opp'n] (suggesting that votes of District residents be counted separately and added to Maryland totals); Tr. of Mot. Hr'g at 114-15.

In sum, we conclude that the plaintiffs in these consolidated cases have standing to raise claims challenging the constitutionality of the exclusion of the District of Columbia from the apportionment of congressional districts.[12]

IV

We now turn to the merits of plaintiffs' claims. In this Part, we consider the *Alexander* plaintiffs' contention that their right to vote in congressional elections is guaranteed by Article I of the Constitution, as well as defendants' opposing argument that the same Article precludes such a right. In Part V, we consider additional arguments, raised by both groups of plaintiffs, premised on other provisions of the Constitution.

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[12] Because the individual plaintiffs in *Alexander* and *Adams*, all adult residents of voting age, have standing to sue, we need not consider whether plaintiff District of Columbia has standing as well. *See United States House of Representatives*, 119 S. Ct. at 773; *Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426, 429 (D.C. Cir. 1998) (en banc) (citing *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996) ("For each claim, if constitutional and prudential standing can be shown for at least one plaintiff, we need not consider the standing of the other plaintiffs to raise that claim.")).

> Article I, section 2, clause 1 of the Constitution provides: The House of Representatives shall be composed of Members chosen every second Year *by the People of the several States*, and the Electors in each *State* shall have the Qualifications requisite for Electors of the most numerous Branch of the *State* Legislature.

U.S. CONST. art. I, § 2, cl. 1 (emphasis added). Although standing alone the phrase "people of the several States" could be read as meaning all the people of the "United States" and not simply those who are citizens of individual states, the Article's subsequent and repeated references to "state[s]" – beginning with the balance of the same clause quoted above – make clear that the former was not intended. *See, e.g., id.* (electors "in each State" shall have qualifications of electors of most numerous branch "of the State Legislature"); *id.* art. I, § 2, cl. 2 (each representative shall "be an Inhabitant of that State" in which he or she is chosen); *id.* art. I, § 2, cl. 3 (representatives shall be "apportioned among the several States which may be included within this Union"); *id.* ("each State shall have at Least one Representative"); *id.* art. I, § 2, cl. 4 (the Executive Authority of the "State" shall fill vacancies); *id.* art. I, § 4, cl. 1 (the legislature of "each State" shall prescribe times, places, and manner of holding elections for representatives). Indeed, for this reason – and as the *Alexander* plaintiffs concede – residents of United States territories are not entitled to vote in federal elections, notwithstanding that they are United States citizens.[13]

Plaintiffs accordingly do not dispute that to succeed they must be able to characterize themselves as citizens of a "state." *See Alexander* Pls.' Opp'n at 15; *accord Adams* Pls.' Opp'n to the Federal Defs.' Mots. to Dismiss at 51 [hereinafter *Adams* Pls.' Opp'n]. Instead, they contend that District

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[13] *See Igartua de la Rosa v. United States*, 32 F.3d 8 (1st Cir. 1994) (holding that United States citizens in Puerto Rico are not entitled to vote in presidential elections); *Attorney Gen. of Guam v. United States*, 738 F.2d 1017 (9th Cir. 1984) (holding that United States citizens in Guam are not entitled to vote in presidential and vice-presidential elections); Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its U.S.-Flag Islands*, U. HAW. L. REV. 445, 512 (1992); *Alexander* Pls.' Opp'n at 5-6.

residents can fairly be characterized as citizens of a "state," as the term was intended in Article I, under either of two theories. First, they argue that the District of Columbia itself may be treated as a state through which its citizens may vote. Second, they contend that District citizens may vote in congressional elections through the State of Maryland, based on their "residual" citizenship in that state -- the state from whose territory the current District was originally carved. In the following sections we consider the validity of each theory.

A

The *Alexander* plaintiffs' first theory is that "the District itself may be treated as the 'state' through which its citizens may vote" under Article I. Mem. in Supp. of Mot. of Pls. Alexander et al. for Summ. J. at 48 [hereinafter *Alexander* Pls.' Summ. J. Mem.]. As plaintiffs correctly note, the Supreme Court has on occasion interpreted the constitutional term "state" to include the District. *See Loughran v. Loughran*, 292 U.S. 216, 228 (1934) (holding that Full Faith and Credit clause binds "courts of the District . . . equally with courts of the States"); *cf. Callan v. Wilson*, 127 U.S. 540, 550 (1888) (holding that right to trial by jury extends to residents of District).[14] As they concede, however, the Court also has interpreted the term "state" to exclude the District. *See, e.g., Hepburn & Dundas v. Ellzey*, 6 U.S. (2 Cranch) 445, 452 (1805) (holding that diversity jurisdiction provision of Article III, section 2 does not cover cases in which one party is resident of District, because "the members of the American confederacy only are the states contemplated in the constitution").

The measure of "[w]hether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular . . . constitutional provision depends upon the

[14] Plaintiffs also note that Congress has passed numerous statutes that treat the District as though it were a state for various purposes. *See Alexander* Pls.' Summ. J. Mem. at 48 n.47 (citing, *inter alia*, 18 U.S.C. § 1961 (RICO Act); 50 U.S.C. § 466 (Military Selective Service Act)). But these expressions of congressional intent, most of which were passed more than a century after the ratification of the Constitution, provide little insight into the intent of the Framers.

character and aim of the specific provision involved."[15] *District of Columbia v. Carter*, 409 U.S. 418, 420 (1973).[16] The cases plaintiffs cite do not involve Article I, nor do they involve constitutional rights that textually appear to require citizenship (or residence) in a state.[17] Defendants argue that, by contrast, when dictating the composition of Congress, the Constitution leaves no doubt that only the residents of actual states are entitled to representation. An examination of the Constitution's language and history, and of the relevant judicial precedents, persuades us that defendants are correct and that the District-as-state theory is untenable.

1. We begin with the language of Article I, which makes clear just how deeply Congressional representation is tied to the structure of statehood. Indeed, as we explore each relevant constitutional provision, it becomes apparent how far afield from the common understandings of the relevant terms we would have to go to sustain plaintiffs' theory.

As previously noted, besides stating that the House shall be composed of members chosen by the people of the several states, clause 1 of Article I, section 2 requires that voters ("Electors") in House elections "have the Qualifications requisite for the Electors of the most numerous branch of *the State Legislature*." U.S. CONST. art. I, § 2, cl. 1

[15] We therefore reject the dissent's suggestion that if the District were not considered a state for purposes of Article I, District residents would also be deprived of the right to travel under Article IV.

[16] In *Carter*, the Court held that the District of Columbia is not a "State or Territory" within the meaning of 42 U.S.C. § 1983, but rather "is truly *sui generis* in our governmental structure." *Carter*, 409 U.S. at 432; *accord Palmore v. United States*, 411 U.S. 389, 395 (1973) ("The District of Columbia is constitutionally distinct from the States . . . .") (citing *Hepburn & Dundas*, 6 U.S. (2 Cranch) at 445).

[17] *See, e.g., Callan*, 127 U.S. at 550 (relying on language of Article III providing that jury trial, for "crimes . . . *not committed within any State*, . . . shall be at such place or places as the legislature may direct"; and noting that Article III was specifically amended "'to provide for trial by jury of offenses committed *out of any state*'") (quoting James Madison) (emphasis added). Although in *Loughran* Justice Brandeis found the Full Faith and Credit Clause, U.S. CONST. art. IV, § 2, to bind "*courts* of the District . . . equally with courts of the States," 292 U.S. at 228 (emphasis added), in *Heald v. District of Columbia*, he made clear that "[*r*]*esidents* of the District lack the suffrage and have politically no voice," 259 U.S. 114, 124 (1922) (emphasis added).

(emphasis added).[18] If the District were regarded as a state for purposes of this provision, what could the reference to "State Legislature[s]" mean? The thirteen original states all had such legislatures, as do each of the present fifty. But for most of its history, the District of Columbia has had nothing that could even roughly be characterized as a legislature for the entire District.[19] Although plaintiffs point to the existence of the current elected city council, *see Alexander* Pls.' Opp'n at 24, Congress did not pass the "home rule" statute creating that entity until 1973, and the Court of Appeals for this Circuit has indicated that such a body is not constitutionally required.[20] A right to vote that depends upon the existence of such an occasional institution can hardly have been what the

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[18] *See also* U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof . . . .").

[19] For the first 70 years, there were separate local governmental structures for Washington, Georgetown, and – until the retrocession of the Virginia portion of the District in 1846 – Alexandria. *See, e.g.*, An Act to Incorporate the Inhabitants of the City of Washington, in the District of Columbia, 2 Stat. 195, ch. 53, § 2 (1802). *See generally* WILLIAM TINDALL, ORIGIN AND GOVERNMENT OF THE DISTRICT OF COLUMBIA 14-29 (1909). In 1871, Congress established a territorial form of government for the District, *see* An Act To Provide a Government for the District of Columbia, 16 Stat. 419, ch. 62 (1871), which was replaced by a commission system in 1874, *see* An Act for the Government of the District of Columbia, and for Other Purposes, 18 Stat. 116, ch. 337 (1874). As modified in 1878, the District's governing body was a three-person commission appointed by the President. *See id.*; An Act Providing a Permanent Form of Government for the District of Columbia, 20 Stat. 102, ch. 180 (1878). The commission system was replaced in 1967 by a mayor-commissioner and council form of government, the members of which were appointed by the President. *See* Reorganization Plan No. 3 of 1967, Pub. L. No. 90-623, 81 Stat. 948 (1967). It was not until 1973 that the present "home rule" form of government was established, creating a mayor and council elected by the citizens of the District and granting them certain executive and legislative authority; the home rule statute reserved ultimate authority over District governance to Congress. *See* District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973).

[20] *See Breakefield v. District of Columbia*, 442 F.2d 1227, 1229 (D.C. Cir. 1970) (noting that Circuit has rejected "the claim that . . . the members of the [then non-elected] City Council were illegally appointed 'because the citizens of the District have not been given the opportunity by popular vote to elect persons to the positions held by' them") (quoting *Carliner v. Commissioner*, 412 F.2d 1090, 1091 (D.C. Cir. 1969)); *see also D.C. Fed'n v. Volpe*, 434 F.2d 436, 443 n.28 (D.C. Cir. 1970); *Hobson v. Tobriner*, 255 F. Supp. 295 (D.D.C. 1966).

Framers contemplated.

Moreover, and more important, it is clear that the ultimate legislature the Constitution envisions for the District is not a city council, but rather Congress itself. The District Clause expressly grants Congress the power to "exercise exclusive Legislation in all Cases whatsoever" over the district that would become the seat of government. U.S. CONST. art. I, § 8, cl. 17. Plaintiffs themselves argue that in the "absence" of a city council, Congress should be considered the state legislature for purposes of Article I. *See Alexander* Pls.' Opp'n at 24. But Congress cannot be characterized as a "state legislature" without doing violence to the meaning of that term. Indeed, to characterize it as such would turn the Qualifications Clause into a circle without beginning or end. Under section 2, clause 1, House voters must have the qualifications requisite for voters of the most numerous branch of the state legislature. If that legislature were Congress itself, with the House as its most numerous branch, then the clause would say no more than that voters for the House must have the qualifications requisite for voters for the House – a tautology without constitutional content.

Including the District within the definition of "state" is also inconsistent with the provisions of clause 3 of Article I, section 2, the clause that directly addresses the issue of congressional apportionment. That clause provides that "Representatives . . . shall be apportioned among *the several States which may be included within this Union*, according to their respective numbers." U.S. CONST. art. I, § 2, cl. 3 (emphasis added).[21]

That provision plainly contemplates true states and not the District, which neither was one of the original states nor has been "admitted by the Congress into this Union." *Id.* art. IV, § 3, cl. 1. Indeed, the "Seat of Government" contemplated by

[21] Section 2 of the Fourteenth Amendment modified this provision by establishing that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons *in each State* . . . ." U.S. CONST. amend. XIV, § 2 (emphasis added); *see Montana*, 503 U.S. at 445 n.1; *see also Carter*, 409 U.S. at 424 ("[T]he District of Columbia is not a 'State' within the meaning of the Fourteenth Amendment . . . .").

the Constitution is subsequently described in Article I as a "District," in contrast to the "particular States" whose cessions of territory were expected to create it.[22] And, as if to remove any doubt, clause 3 goes on to identify specifically those thirteen entities it regards as the immediate post-ratification states, and to assign each an initial apportionment of representatives until an "actual Enumeration" of "each State['s]" "respective Numbers" can be accomplished. *Id.* art. I, § 2, cl. 3.[23] The District is not included within that initial apportionment.[24]

The effort to define the District as a state generates still further incongruities with respect to the next clause of Article I, section 2. Clause 4 provides: "When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies."

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[22] *See* U.S. CONST. art. I, § 8, cl. 17 (granting Congress power to exercise exclusive legislation in all cases whatsoever "over such District . . . as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States").

[23] The clause reads:

> The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

U.S. CONST. art. I, § 2, cl. 3.

[24] Plaintiffs suggest that the District may not have been included because the site of the seat of government had not yet been chosen when the Constitution was drafted, and because no one knew what its population would be. While it is true that the District did not exist at the time the Constitution was drafted, provision had been made for its creation, *see* U.S. CONST. art. I, § 8, cl. 17, and it was possible that it would be established prior to the first enumeration (i.e., the first census). It is also true that the original population of the District was small. *Compare* TINDALL, *supra* note 19, at 15 (estimating 1800 population at 14,093), *with* 2 BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES 26 (bicentennial ed. 1975) (listing 1800 census count at 8,000). The Framers, however, assumed that the population would grow substantially. L'Enfant's original plan provided for a city of 800,000, which at the time was the size of Paris. *See Home Rule: Hearings Before Subcomm. No. 6 of the Comm. on the District of Columbia*, 88th Cong. 347 (1964) (statement of Robert F. Kennedy, Attorney General).

Id. art. I, § 2, cl. 4. But who or what is "the Executive Authority" of the District? Plaintiffs offer the current home-rule mayor as that authority, *see Alexander* Pls.' Opp'n at 24, but we again are confronted by the relative recency of that position. *See supra note* 19. And we also again have the problem that it is Congress that is the ultimate executive authority for the District. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76 (1982) ("Congress' power over the District of Columbia encompasses the full authority of government, and thus, necessarily, the Executive and Judicial powers as well as the Legislative."). The possibility that the Framers intended Congress to fill its own vacancies seems far too much of a stretch, even if the constitutional fabric were more flexible than it appears to be.

When we turn to the provisions of the Constitution that originally governed voting for the Senate, the complications of defining the District as a state become even more apparent. Although we are remanding the merits of plaintiffs' claims for Senate representation to a single-judge court, the relationship between the House and Senate provisions nonetheless requires us to examine the latter in order to determine the Framers' intentions with respect to the House.

As originally provided under Article I, section 3, the Senate was to be "composed of two Senators from each State," chosen not "by the People of the several States," as in the case of the House, but rather "*by the Legislature thereof.*" U.S. CONST. art. I, § 3, cl. 1 (emphasis added). The impossibility of treating Congress as the legislature under that clause is manifest, as doing so would mean that Congress would itself choose the District's senators. The scenario is further complicated by the fact that clause 2 of the same section provides that Senate vacancies will be filled not just by the state's "Executive," as with the House, but also by the state's "Legislature" when not in recess. *Id.* art. I, § 3, cl. 2. Since, as noted above, Congress is ultimately both the Legislature and Executive for the District, plaintiffs' theory would mean that Congress would fill vacancies in the District's Senate seats – except when Congress is in recess, in which event Congress

would also fill the vacancies.

It is, of course, not surprising to conclude that the Framers did not contemplate allocating two senators to the District of Columbia. The Senate was expressly viewed as representing the states themselves, *see* THE FEDERALIST NOS. 10, 39, 58, 62 (James Madison) (Jacob E. Cooke ed., 1961), and the guarantee of two senators for each was an important element of the Great Compromise between the smaller and larger states that ensured ratification of the Constitution: the smaller states were guaranteed equal representation notwithstanding their smaller populations. *See Reynolds v. Sims*, 377 U.S. 533, 574 (1964); *Wesberry*, 376 U.S. at 12-13; *see also INS v. Chadha*, 462 U.S. 919, 950 (1983). But reaching this conclusion with respect to the Senate requires reaching a similar conclusion with respect to the House. The House provisions, after all, were "the other side of the compromise": to satisfy the larger states, the House was to be popularly elected, and "in allocating Congressmen the number assigned to *each State* should be determined solely by the number of the State's inhabitants." *Wesberry*, 376 U.S. at 13 (emphasis added). Treating the Senate and House differently with respect to the District would unhitch half that compromise from its historical and constitutional moorings.

In 1913, the Seventeenth Amendment granted the people of "each State," rather than their legislatures, the right to choose senators. U.S. CONST. amend. XVII, cl. 1. After that change, the provisions concerning qualifications and vacancies for the Senate essentially paralle those for the House. *See id.* (providing that "electors . . . shall have the qualifications requisite for electors of the most numerous branch of the State legislatures"); *id.* cl. 2 ("When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments . . . ."). *But see id.* cl. 1 (providing that senators shall be elected by people of "each State," rather than "of the several states" as in provision for representatives in Article I,

section 2, clause 1). Accordingly, no separate discussion of those provisions is necessary.

2. We conclude from our analysis of the text that the Constitution does not contemplate that the District may serve as a state for purposes of the apportionment of congressional representatives. That textual evidence is supported by historical evidence concerning the general understanding at the time of the District's creation.

It is true, as plaintiffs note, that the voting rights of District residents received little express attention at the time of the Constitution's drafting. *See generally* Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 HARV. J. ON LEGIS. 167, 172 (1975). As plaintiffs suggest, this lack of attention may have been due to the fact that the District's geographic location had not yet been determined, and that even once selected, the territory had relatively few residents. *See supra* note 24. *But see id.* (noting that L'Enfant anticipated city of Washington growing to size of 800,000). It is also true, as our dissenting colleague argues, that the historical rationale for the District Clause -- ensuring that Congress would not have to depend upon another sovereign for its protection -- would not by itself require the exclusion of District residents from the congressional franchise.[25]

[25] There is general agreement that the District Clause was adopted in response to an incident in Philadelphia in 1783, in which a crowd of disbanded Revolutionary War soldiers, angry at not having been paid, gathered to protest in front of the building in which the Continental Congress was meeting under the Articles of Confederation. *See, e.g.*, KENNETH R. BOWLING, THE CREATION OF WASHINGTON, D.C. 30-34 (1991); THE FEDERALIST NO. 43, *supra*, at 289; JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION §§ 1213 (1833). Despite requests from the Congress, the Pennsylvania state government declined to call out its militia to respond to the threat, and the Congress had to adjourn abruptly to New Jersey. The episode, viewed as an affront to the weak national government, led to the widespread belief that exclusive federal control over the national capital was necessary. "Without it," Madison wrote, "not only the public authority might be insulted and its proceedings be interrupted, with impunity; but a dependence of the members of the general Government, on the State comprehending the seat of the Government for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the Government, and dissatisfactory to the other members of the confederacy." THE FEDERALIST NO.

(continued...)

Such evidence as does exist, however, indicates a contemporary understanding that residents of the District would not have a vote in the national Congress. At the New York ratifying convention,[25] for example, Thomas Tredwell argued that "[t]he plan of the *federal city*, sir, departs from every principle of freedom . . . subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 402 (Jonathan Elliot ed., 2d ed. 1888), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 225 (Philip B. Kurland & Ralph Lerner eds., 1987).[27] On the same day at that

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[25] (...continued)

43, *supra*, at 289; *see also* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 220 (Jonathan Elliot ed., 2d ed. 1888), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 225 (Philip B. Kurland & Ralph Lerner eds., 1987) ("Do we not all remember that, in the year 1783, a band of soldiers went and insulted Congress? . . . . It is to be hoped that such a disgraceful scene will never happen again; but that, for the future, the national government will be able to protect itself.") (North Carolina ratifying convention, remarks of Mr. Iredell).

Although this self-protection rationale has little relevance for the question of congressional representation, other statements by Madison concerning the rationale for the District Clause suggest he did not view the District as the constitutional equivalent of a state. *See, e.g.*, THE FEDERALIST NO. 43, *supra*, at 289 (arguing that "the gradual accumulation of public improvements at the stationary residence of the Government, would be . . . too great a public pledge to be left in the hands of a single State"); *see also* JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787, WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 332 (Gaillard Hunt & James Brown Scott eds., 1970) (noting George Mason's objection that having national capital and a state capital at the same place would give "a provincial tincture to your national deliberations").

[26] *Cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 791-92 (1995) (noting that Court has used ratification debates to confirm Framers' understanding of Article I) (citing *Powell v. McCormack*, 395 U.S. 486 (1969)).

[27] *See also* BOWLING, *supra* note 25, at 82 (noting that opponents of Constitution charged that District residents "would be subject to a government with absolute authority over them but in which they were unrepresented").

In FEDERALIST NO. 43, Madison expressed the view that inhabitants of the District will have acquiesced in cession, "as they will have had their voice in the election of the Government which is to exercise authority over them . . . ." THE

(continued...)

convention, Alexander Hamilton proposed that the Constitution be amended to provide: "When the Number of Persons in the District or Territory to be laid out for the Seat of the Government of the United States . . . amount to ___ [an unspecified number] . . . Provision shall be made by Congress for having a District representation in that Body." 5 THE PAPERS OF ALEXANDER HAMILTON 189-90 (Harold C. Syrett & Jacob E. Cooke eds., 1962). The proposed amendment failed. *See id.*

Considerably more evidence of the contemporary understanding emerges from examination of the period immediately surrounding Congress' assumption of exclusive jurisdiction over the land ceded for the District by Maryland and Virginia.[28] During that period, some residents of the District sought to dissuade Congress from passing the Organic Act of 1801, 2 Stat. 103 (1801), through which jurisdiction was to be assumed. They believed that, under the Constitution, once Congress assumed jurisdiction they would necessarily lose their vote and be "reduced to the mortifying situation, of being subject to laws made, or to be made, by we know not whom; by agents, not of our choice, in no degree responsible to us." ENQUIRIES INTO THE NECESSITY OR EXPEDIENCY OF ASSUMING EXCLUSIVE LEGISLATION OVER THE DISTRICT OF COLUMBIA 15 (1800) [hereinafter ENQUIRIES INTO THE NECESSITY] (available in Rare Book/Special Collections Reading Room, Library of Congress).[29] Members of Congress opposed to the Organic

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[27] (...continued)

FEDERALIST NO. 43, *supra*, at 289. As plaintiffs concede, this is generally understood as a reference to the fact that before cession the residents would "have had" a voice in that decision, not a suggestion that they would have a voice in Congress thereafter. *See* Mem. Amici Curiae for Professors James D.A. Boyle et al. at 21 n.13; Raven-Hansen, *supra*, at 172 n.24.

[28] *Cf. U.S. Term Limits, Inc.*, 514 U.S. at 816 (examining 1807 congressional debates as "further evidence of the general consensus" regarding meaning of Article I, section 2, clause 2).

[29] Paralleling our analysis in the previous section, the author of this letter to Congress wrote that "we cannot hope to have our situation ameli[illegible]ted" by the Constitution for two reasons. ENQUIRIES INTO THE NECESSITY, *supra*, at 16. First, he noted:

In the 2d Section of the 1st article, the rule of representation is settled. "The (continued...)

Act made the same argument. *See, e.g.*, 10 ANNALS OF CONG. 992 (1801) (remarks of Rep. Smilie) (arguing that upon assumption of congressional jurisdiction, "the people of the District would be reduced to the state of subjects, and deprived of their political rights"). Even those who supported the Act appeared to agree that, under the Constitution, once Congress assumed jurisdiction the residents would automatically lose their right to vote. *See, e.g.*, *id.* at 996 (remarks of Rep. Bird) (noting that although "the people [of the District] could not be represented in the General Government," the "blame" was not "to the men who made the act of cession; not to those who accepted it," but "to the men who framed the Constitutional provision, who peculiarly set apart this as a District under the national safeguard and Government").[30]

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[29] (...continued)

House of Representatives shall be composed of members, chosen every second year, by the people of the several states," but if we cease to be of any state, we can derive no benefit from that clause.

Id. Second, he noted that the same section also "excludes us from the privilege of voting for members of congress" because

[T]he provision is, that 'the electors in each state shall have the qualification requisite for electors of the most numerous branch of the state legislature,' and if we are not qualified to vote for the state legislature, we are not qualified to vote for members of congress.

Id. at 18-19.

[30] Other debates concerning the District also reflected the understanding that District residents would lack a vote in the national Congress. *See* FEDERAL GAZETTE & BALTIMORE DAILY ADVERTISER, Feb. 21, 1801, at 2 (remarks of Rep. Gallatin) ("[T]his was not the fault of the present congress: if any fault, it laid with the [constitutional] convention, who expressly provided that exclusive jurisdiction should be assumed, and therefore the people [of the District] could not be represented in the general government."); FEDERAL GAZETTE & BALTIMORE DAILY ADVERTISER, Feb. 26, 1801, at 2 (reporting that "Mr. Nicholson, as a representative of the state of Maryland could not avoid expressing his opinion, upon a subject so highly interesting to a part of the people of that state, who were divested, by the assumption of jurisdiction, . . . of the right of voting for . . . the house of representatives to the general government. There ought to be, in his opinion, some weighty reasons urged why they should not be possessed with other rights as great, in the election of their local legislature."); WASHINGTON FEDERALIST, Mar. 3, 1801, at 2 (reporting same statement by Rep. Nicholson) [all sources available in Newspaper and Current Periodical Reading Room, Library of Congress].

Others saw a constitutional amendment – rather than blocking Congress' assumption of jurisdiction – as the best way to preserve the franchise for the District's residents. *See, e.g.*, 10 ANNALS OF CONG. 998-99 (1801) (remarks of Rep. Dennis) ("[I]f it should be necessary, the Constitution might be so altered as to give them a delegate to the General Legislature, when their numbers should become sufficient."). In 1801, Augustus Woodward, a prominent lawyer who practiced in the District of Columbia, published a pamphlet decrying the area's lack of congressional representation, calling it a violation of "an original principle of republicanism, to deny that all who are governed by the laws ought to participate in the formation of them." AUGUSTUS WOODWARD, CONSIDERATIONS ON THE TERRITORY OF COLUMBIA 5-6 (1801) (available in Rare Book/Special Collections Reading Room, Library of Congress).[31] Woodward called for representation of the District in the Senate and the House, but recognized that "[i]t will require an amendment to the Constitution of the United States." *Id.* at 6. Accordingly, he proposed one. *See id.* at 15.[32]

Within a few years of the assumption of congressional jurisdiction, still others saw retrocession of the District to Maryland and Virginia as the only remedy for the "political slave[ry]" of nonrepresentation. 12 ANNALS OF CONG. 487 (1803) (remarks of Rep. Smilie); *see id.* ("Under our exercise of exclusive jurisdiction the citizens here are deprived of all political rights, nor can we confer them. . . . Why not then restore the people to their former condition?"). In 1803, a bill calling for retrocession was introduced in Congress. *See id.* at 487-506. Although the bill was defeated, *see id.* at 506, the

[31] Woodward was a friend and protégé of Thomas Jefferson, who appointed him judge of the Supreme Court of the Michigan Territory in 1805. *See* Richard P. Cole, *Law and Community in the New Nation: Three Visions for Michigan, 1788-1831*, 4 S. CAL. INTERDISC. L.J. 161, 196-98 (1995).

[32] In another pamphlet, written under the pseudonym Epaminondas, Woodward opposed the suggestion that "it is better for Congress never to assume the jurisdiction." 5 EPAMINONDAS ON THE GOVERNMENT OF THE TERRITORY OF COLUMBIA 9 (1801) (available in Rare Book/Special Collections Reading Room, Library of Congress). Constitutional amendment was to be preferred, he said, and was "the *exclusive* and *only* remedy." *Id.* (emphasis in original).

residents of the former Virginia territory eventually succeeded in obtaining retrocession in 1846, *see* An Act to Retrocede the County of Alexandria, in the District of Columbia, to the State of Virginia, 9 Stat. 35 (1846).[33]

Although the foregoing represents positive evidence of a contemporary understanding that District residents would not (and did not) have the right to vote in Congress, perhaps more important is the absence of evidence to the contrary. No political leaders, for example, assured the residents that they would have representation even without constitutional amendment or defeat of the Organic Act. Nor is there any indication that the residents of the new District were surprised when they found themselves without the vote after Congress assumed exclusive jurisdiction in 1801. Indeed, had it been understood that the former citizens of Maryland and Virginia had a right to continue voting for Congress, one would have expected a flood of newspaper articles and lawsuits decrying their unlawful disenfranchisement. Such a reaction, however, is not visible in the historical record.[34]

[33] In 1818, President Monroe, who had been a delegate to the Virginia ratifying convention, noted that the people of the District of Columbia "have no participation" in Congress' exercise of power over them, and asked Congress to consider "whether an arrangement better adapted to the principles of our Government" might be possible. 33 ANNALS OF CONG. 18 (1818). No specific arrangement was proposed. *See generally* 3 STORY, *supra* note 25, § 1218 (1833) (noting that inhabitants of the District "are not indeed citizens of any state, entitled to the privileges of such, but are citizens of the United States" and that "[t]hey have no immediate representatives in congress").

[34] *See e.g.*, COLUMBIAN MIRROR & ALEXANDRIA GAZETTE (Alexandria, Va.), Apr. 13, 1799 through Dec. 6, 1800 (further dates unavailable); FEDERAL GAZETTE & BALTIMORE DAILY ADVERTISER (Baltimore, Md.), July 1, 1800 through Dec. 31, 1801 (further dates unavailable); WASHINGTON FEDERALIST (Georgetown, D.C.), Sept. 25, 1800 through Dec. 29, 1802 [all sources available in Newspaper and Current Periodical Reading Room, Library of Congress]. To the contrary, the newspapers extensively reported the congressional debates on the Organic Act, which frequently expressed the understanding that District residents would not have a vote in Congress. *See, e.g.*, FEDERAL GAZETTE, Feb. 19, 1801, at 2 (remarks of Rep. Smilie); WASHINGTON FEDERALIST, Feb. 24, 1801, at 2 (same); *see also* FEDERAL GAZETTE, Feb. 19, 1801, at 2 (remarks of Rep. Dennis); FEDERAL GAZETTE, Feb. 21, 1801, at 2 (remarks of Rep. Gallatin); FEDERAL GAZETTE, Feb. 26, 1801, at 2 (remarks of Rep. Nicholson).

A resident of the former Virginia territory did sue for the right to vote in

(continued...)

3. Finally, we note that every other court to have considered the question – whether in dictum or in holding – has concluded that residents of the District do not have the right to vote for members of Congress. The early Supreme Court decisions are particularly relevant here, not only because they are binding upon us, but because they reflect the historical understanding of Chief Justice Marshall, who "wrote from close personal knowledge of the Founders and the foundation of our constitutional structure." *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 587 (1949) [hereinafter *Tidewater*] (plurality opinion of Jackson, J.).

In 1805, the Chief Justice considered whether the District of Columbia was a "state" within the meaning of the Judiciary Act of 1789, which effectuated Article III's grant of diversity jurisdiction by giving circuit courts authority over cases "between a citizen of the state in which the suit is brought, and a citizen of another state." *Hepburn & Dundas*, 6 U.S. (2 Cranch) at 452 (citing, without citation, 1 Stat. 73, 78 (1789)). Plaintiffs contended there, as they do here, that the word "state" can mean more than simply one of the members of the union. Although Marshall agreed that was true, in his view "the act of congress obviously uses the word 'state' in reference to the term used in the constitution." *Id.* Expressly relying on his understanding of the meaning of that term in the clauses that prescribe the composition of the House and the Senate, Marshall concluded that "state" could not encompass the District for purposes of Article III. "These clauses," he said, referring to the clauses of Article I, "show that the word state is used in the constitution as designating a member of the union." *Id.* at 452-53. Because the word "has been used plainly in this limited sense in the articles respecting the legislative and executive departments," he

[34] (...continued)
Virginia state elections. *See Custis v. Lane*, 17 Va. (3 Munf.) 579 (1813). The Virginia Supreme Court, however, rejected the claim on the ground that plaintiff was no longer a citizen of that state. Reflecting the same understanding as that in the congressional debates, the court held: "That he is no longer within the jurisdiction of the commonwealth of Virginia, is manifest from this consideration, that congress are vested, by the constitution, with exclusive power of legislation over the territory in question . . . ." *Id.* at 591.

concluded, "it must be understood as retaining th[at] sense" in the article concerning the judicial branch. *Id.* at 453.

Marshall was not unaware of the unfairness his conclusion would engender. He felt constrained to reach it, however, notwithstanding that it was "extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union," should be closed to citizens of the United States who reside in the District. *Id.* at 453. Sixteen years later, Marshall reaffirmed *Hepburn & Dundas*'s conclusion in *Corporation of New Orleans v. Winter*, 14 U.S. (1 Wheat.) 91 (1816).

The dissent contends that Chief Justice Marshall's position has since been undermined by *Tidewater*, in which the Supreme Court held it constitutional for Congress to open the federal courts to an action by a citizen of the District of Columbia against a citizen of one of the states. But in so doing, a plurality of the Court reconfirmed Marshall's conclusion that the District was not a state within the meaning of Article III's grant of jurisdiction to the federal courts, holding instead that Congress had lawfully expanded federal jurisdiction beyond the bounds of Article III by using its Article I power to legislate for the District. *See Tidewater*, 337 U.S. at 600 (plurality opinion of Jackson, J.). Although two other Justices opined that Marshall's holding in *Hepburn & Dundas* should be reversed, even they limited their disagreement to Article III's Diversity Clause, taking pains to distinguish between constitutional clauses "affecting civil rights of citizens," such as that clause, and "the purely political clauses," among which they counted "the requirements that members of the House of Representatives be chosen by the people of the several states." *Id.* at 619-623 (Rutledge, J., concurring).

In 1820, Marshall reviewed a claim that, because District residents were unrepresented in Congress, the national legislature lacked the power to impose a direct tax upon the District. *See Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317 (1820). If there were a Justice who would have been particularly sensitive to this reprise of the Revolutionary War

battle cry of "no taxation without representation," surely it would have been Marshall – who served as a company commander at Valley Forge. *See* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 62-65 (1996). Nonetheless, speaking for a unanimous Court, Marshall held that Congress had the power to tax residents of the District of Columbia despite their lack of representation. *See Loughborough*, 18 U.S. (5 Wheat.) at 317. The District, he said, "relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government." *Id.* at 324. "Although in theory it might be more congenial to the spirit of our institutions to admit a representative from the district," he declared, "certainly the Constitution does not consider their want of a representative in Congress as exempting it from equal taxation." *Id.* at 324-25.

The opinions do not end with those of Chief Justice Marshall. In *Heald v. District of Columbia*, Justice Brandeis also faced a claim that a congressional tax on the District was unconstitutional "because it subjects the residents of the District to taxation without representation." 259 U.S. 114, 124 (1922). Like Marshall, Brandeis recognized that "[r]esidents of the district lack the suffrage and have politically no voice in the expenditure of the money raised by taxation." *Id.* Nonetheless, he concluded that "[t]here is no constitutional provision which so limits the power of Congress that taxes can be imposed only upon those who have political representation." *Id.*; *see also Palmore v. United States*, 411 U.S. 389, 395 (1973) (citing, with approval, *Hepburn & Dundas*, 6 U.S. (2 Cranch) at 445).

The cry of "no taxation without representation" has reached the courts of this circuit as well. In *Breakefield v. District of Columbia*, the Court of Appeals considered a challenge to Congress' imposition of an income tax upon District residents "notwithstanding that they then had and now have no elected representative in the Congress." 442 F.2d 1227, 1228 (D.C. Cir. 1970). Petitioner acknowledged the existence of contrary precedent, namely the Supreme Court's decisions in *Loughborough* and *Heald*, but "question[ed]

both the original soundness" of those decisions "and their continuing vitality in the light of later Supreme Court pronouncements." *Id.* at 1229. "[Petitioner] presents those contentions in the wrong forum," the court said. "[I]t is for the Supreme Court, not us, to proclaim error in its past rulings, or their erosion by its adjudications since." *Id.* at 1229-30. We are of the same view.

4. In sum, we conclude that constitutional text, history, and judicial precedent bar us from accepting plaintiffs' contention that the District of Columbia may be considered a state for purposes of congressional representation under Article I.

Before proceeding to plaintiffs' alternative argument, we pause over another advanced by the dissent. As noted at the outset of this Part, plaintiffs do not dispute that to succeed under Article I they must be able to characterize themselves as citizens of a state. Our dissenting colleague, however, does dispute that assumption, contending that the Article's repeated use of the word "state" does not necessarily mean the Framers intended to apportion representatives *only* among states. As the dissent correctly points out, "the legal maxim *expressio unius est exclusio alterius* ('the mention of one thing implies the exclusion of another') is not always correct." *In re Sealed Case*, 181 F.3d 128, 132 (D.C. Cir. 1999) (en banc). And we certainly should not resolve as important a question as that now before us by rote application of such a canon of construction.

This, however, is not a case where "[t]he 'exclusio' is . . . the result of inadvertence or accident." *Ford v. United States*, 273 U.S. 593, 612 (1927) (internal quotation omitted). As we have discussed above, the overlapping and interconnected use of the term "state" in the relevant provisions of Article I, the historical evidence of contemporary understandings, and the opinions of our judicial forebears all reinforce how deeply Congressional representation is tied to the structure of statehood.[35] The Constitution's repeated references to states

[35] As we discuss below, this conclusion is not inconsistent with the fact that the right to vote for federal officers is a right of national citizenship. *See infra* Part

(continued...)

cannot be understood, as the dissent urges, as merely the most practical method then available for holding elections. Rather, they are reflections of the Great Compromise forged to ensure the Constitution's ratification. There is simply no evidence that the Framers intended that not only citizens of states, but unspecified others as well, would share in the congressional franchise.

B

As an alternative to the argument that the District may be considered a state under Article I, the *Alexander* plaintiffs contend that residents of the District should be permitted to vote in congressional elections through Maryland, based on a theory of "residual" citizenship in that state. This theory depends heavily on the fact that residents of the land ceded by Maryland apparently continued to vote in Maryland elections during the period between the Act of 1790, by which Congress accepted the cession, and the Organic Act of 1801, by which Congress assumed jurisdiction and provided for the government of the District. We discuss that history and its implications below.

Although in the end we find that we cannot draw the same conclusion plaintiffs do from the historical record, we must begin by noting that there is a much greater obstacle to plaintiffs' success on this theory: it has already been rejected in a decision binding upon this court. In *Albaugh v. Tawes*, a three-judge district court considered a suit seeking a declaratory judgment "that the District of Columbia is a part of the State of Maryland for purposes of United States Senator elections." 233 F. Supp. 576, 576 (D. Md. 1964). Plaintiff's arguments were "based upon the fact that . . . during the period between 1790 and the 'Organic Act of 1801,' residents of the territory ceded by the State of Maryland may have been allowed to vote as residents" of that state. *Id.* at 578. The court rejected plaintiffs' claims, noting the Supreme Court's decision in *Reily v. Lamar* that former residents of Maryland

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[35] (...continued)
V.B and note 69.

lost their state citizenship upon "the separation of the District of Columbia from the State of Maryland." *Id.* (quoting *Reily v. Lamar*, 6 U.S. (2 Cranch) 344, 356-57 (1805)). *Albaugh* concluded that "residents of the District of Columbia have no right to vote in Maryland elections generally, and specifically, in the selection of United States Senators." *Id.* at 577.

The Supreme Court affirmed the decision of the three-judge court. *See Albaugh v. Tawes*, 379 U.S. 27 (1964) (per curiam). Although the Supreme Court's affirmance was summary, the Court has reminded the lower courts that we are bound by such affirmances "until such time as the Court informs [us] that [we] are not." *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (quoting *Doe v. Hodgson*, 478 F.2d 537, 539 (2d Cir. 1973)). The jurisdictional statement submitted to the Supreme Court in *Albaugh* raised the principal theories we consider in this Part, and also raised the "privileges or immunities" claim considered in Part V.[36] *Cf.* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 219-20 (7th ed. 1993) (noting importance of evaluating issues raised in appeal papers); *see also Illinois State Bd. v. Socialist Workers Party*, 440 U.S. 173, 182-83 (1979); *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Accordingly, the decision in *Albaugh* forecloses the conclusion that District residents may be allowed to vote in congressional elections through the State of Maryland. The

[36] The jurisdictional statement attacked the lower court opinion for failing to accept the significance of the fact that, through the effective date of the 1801 Organic Act, Maryland continued to designate its District lands as part of the state's federal congressional districts. *See* Jurisdictional Statement at 4-5, *Albaugh v. Tawes*, 379 U.S. 27 (1964) (No. 481) [hereinafter *Albaugh* Jurisdictional Statement]; *cf. infra* Part IV.B.2. It further argued that since "[t]he District of Columbia territory, like the rest of the State of Maryland, was a charter member of the United States," its citizens "have always been citizens of the State of Maryland and under the perpetual protection of the . . . 'equal privileges' clause." *Albaugh* Jurisdictional Statement at 7 (citing U.S. CONST. art. IV, § 2, cl. 1). This meant, plaintiff said, that the right of District citizens to vote could not constitutionally be denied. *See id.*; *cf. infra* Part IV.B.3; *infra* Part V.B. The jurisdictional statement also raised the claim, made by amicus here, that the Organic Act was not intended to "repeal[] the existing Maryland Congressional election regulations which defined the District of Columbia as a part of the State of Maryland," since it provided "that the laws of the State of Maryland, as they now exist, shall be and continue in force." *Albaugh* Jurisdictional Statement at 6 (quoting 2 Stat. 103, §1); *cf. infra* note 46.

Fourth Circuit has recently reached the same determination, in a case raising the same basic claim.[37]

Even if *Albaugh* were not an impediment, however, we would still be unable to accept the "residual" citizenship theory advanced by plaintiffs. That theory fails because the Maryland citizenship of the District's inhabitants was extinguished upon the completion of the transfer of the seat of the national government to the territory of the District. We set forth our analysis in the following subsections.

1. The District Clause gave Congress the power to exercise exclusive legislation "over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States." U.S. CONST. art. I, § 8, cl. 17. In 1788, the General Assembly of Maryland had authorized and required its representatives to cede any district in the state for the national capital; Virginia did the same.[38] After protracted debate over sites offered by several states, Congress agreed upon a tract along the Potomac River; Maryland agreed to cede land along the eastern bank while Virginia agreed to cede land along the western.[39] Congress accepted the cessions by the Act of July 16, 1790, and established the first Monday of December 1800 as the date for the removal of the government to the District.[40] In 1791, Maryland ratified the

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[37] *See Howard v. State Admin. Bd.*, 122 F.3d 1061 (4th Cir. 1997) (unpublished opinion), *aff'g* 976 F. Supp. 350 (D. Md. 1996) (holding that plaintiff's argument, that as "a resident of the District of Columbia . . . he has the right to participate in congressional elections in the State of Maryland," is "foreclosed by" *Albaugh*). The Committee for the Capital City, amicus curiae here, was also amicus in *Howard*.

[38] *See* An Act to Cede to Congress a District of Ten Miles Square in This State for the Seat of Government of the United States, 2 Kilty Laws of Md., ch. 46 (1788); *see also* An Act for the Cession of Ten Miles Square, or Any Lesser Quantity of Territory Within This State, to the United States, in Congress Assembled, for the Permanent Seat of the General Government, 13 Va. Stat. at Large, ch. 32, at 43 (Hening 1823) (enacted 1789).

[39] *See generally* BOWLING, *supra* note 25, at 127-207.

[40] *See* An Act for Establishing the Temporary and Permanent Seat of the Government of the United States, 1 Stat. 130 (1790). The Act stated:

SECTION 1. . . . That a district of territory, not exceeding ten miles square, to

(continued...)

cession, stating that "all that part of the said territory called Columbia which lies within the limits of this State shall be . . . forever ceded and relinquished to the Congress and Government of the United States, and full and absolute right and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon."[41]

Congress' acceptance of the cessions specified that the "seat of the government of the United States" would "be transferred to the district" on the "first Monday in December" of 1800. 1 Stat. 130, § 6. Until that time, Philadelphia was to serve as the seat of government. *See id.* § 5. During that interim, the acceptance statute provided that "the operation of the laws of the state [Maryland or Virginia, respectively] within such district shall not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide." *Id.* § 1. Similarly, in making their cessions, both Maryland and Virginia stipulated that their jurisdiction "over the persons and property of individuals residing within the limits of the cession" would "not cease until" Congress did "by law provide for the government thereof, under their jurisdiction, in the manner provided by the [District Clause] of the Constitution." 1791 Md. Acts ch. 45, § 2; 13 Va. Stat. at Large, ch. 32, at 43. On February 27, 1801, Congress passed the so-called "Organic Act," providing for the government and the

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[40] (...continued)

be located as hereafter directed on the river Potomac, at some place between the mouths of the Eastern Branch and Connogochegue, be, and the same is hereby accepted for the permanent seat of the government of the United States. *Provided nevertheless*, That the operation of the laws of the state within such district shall not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide.

. . . .

SEC. 6. . . . That on the said first Monday in December, in the year one thousand eight hundred, the seat of the government of the United States shall, by virtue of this act, be transferred to the district and place aforesaid.

Id.

[41] An Act Concerning the Territory of Columbia and the City of Washington, 1791 Md. Acts ch. 45, § 2. As noted above, Congress retroceded the Virginia portion of the District in 1846.

administration of justice in the District of Columbia. *See* 2 Stat. 103.

There is evidence that during the period prior to the transfer of the seat of government to the District, the residents of the area continued to vote for Congress in Maryland and Virginia. *See* WILLIAM TINDALL, ORIGIN AND GOVERNMENT OF THE DISTRICT OF COLUMBIA 17 (1909); Raven-Hansen, *supra*, at 173-74. When the laws of those states ceased having force in the District, however, the states ceased treating District citizens as state citizens eligible to vote in their elections -- an event that occurred no later than February of 1801. *See Alexander* Am. Compl. ¶ 97; TINDALL, *supra*, at 17; Raven-Hansen, *supra*, at 174. Since that date, District residents have been unable to vote in either Maryland or Virginia.

2. The *Alexander* plaintiffs and several amici contend that the above-described history, and particularly the fact that residents of the area continued to vote in congressional elections into the year 1800, demonstrates that the Framers did not intend the cession of the states' lands to deprive their residents of the right to vote. As citizens of Maryland and Virginia, plaintiffs argue, the residents of the District were originally part of the "People of the several States," continued to vote even after the land was ceded to the national government, and hence "retain a residual citizenship in the state[s] from which the District was created." *Alexander* Pls.' Opp'n at 16. This "historical experience," they contend, "confirms that otherwise stateless citizens may retain prior state affiliation for purposes of exercising their constitutional right to vote." *Alexander* Pls.' Summ. J. Mem. at 51-52.

We are unable to draw this conclusion from the history recounted above. Contrary to plaintiffs' suggestion, the fact that residents of the Virginia and Maryland lands voted in those states into 1800 did not reflect an understanding that they would continue to do so after the District became the seat of government. Rather, it reflected the fact that during this period those lands were not yet the seat of government (Philadelphia was), but instead remained part of the ceding states. As the Circuit Court for the District of Columbia held

in 1801, "Virginia did not part with her jurisdiction until congress could exercise it, which, by the [District Clause of the] constitution, could not be until the district became the seat of government." *United States v. Hammond*, 26 F. Cas. 96, 96 (C.C.D.C. 1801). That, the court held, occurred on "the first Monday of December, 1800" by virtue of the Act of 1790. *Id.*[42] In *Reily v. Lamar*, Chief Justice Marshall reached a similar conclusion with respect to Maryland, although for the purposes of that case he found it "not material to inquire, whether the inhabitants of the city of Washington ceased to be citizens of Maryland on the 27th day of February 1801," when the Organic Act took effect, "or on the first Monday of December 1800." 6 U.S. (2 Cranch) 344, 357 (1805); *see also Young v. Bank of Alexandria*, 8 U.S. (4 Cranch) 384, 396 (1808) (Marshall, C.J.) ("[U]nder the terms of the cession and acceptance of the district, . . . the power of legislation remained in Virginia until it was exercised by congress."). The precise date is likewise immaterial for our purposes.[43]

In sum, during the interim period, the territory's residents continued to vote not as "residual" citizens of Maryland, but as actual citizens of that state.[44] Only thereafter did they lose

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[42] In addition to the District Clause and the Act of 1790, the court relied on the proviso in the Virginia cession act, which stated that "the jurisdiction of the laws of this commonwealth over the persons and property of individuals residing within the limits of the cession aforesaid, shall not cease or determine, until congress, having accepted the said cession, shall by law provide for the government thereof, under their jurisdiction, in manner provided by the [District Clause]." *Hammond*, 26 F. Cas. at 97 (quoting 13 Va. Stat. at Large, ch. 32, at 43); *see also* 1791 Md. Acts ch. 45, §2 (parallel proviso in Maryland's ratification of its cession).

[43] The three-judge court in *Albaugh* held that "[s]ince the 'Organic Act of 1801,' it has been uniformly recognized . . . that residents of the District of Columbia are no longer citizens of the State of Maryland." 233 F. Supp. at 578.

[44] In *Hammond*, 26 F. Cas. at 99, the court held that "[b]y the constitution, congress could not exercise exclusive legislation over the district until it had become the seat of government." Even if we were to assume to the contrary that Congress acquired the authority to exercise exclusive control over the District in 1790, that would not change the analysis. Whatever Congress' *authority* may have been during the interim period, it left control of the area to Maryland and Virginia. Since 1801, however, Congress has continuously exercised exclusive authority over the District. It is thus unnecessary for us to consider whether District residents would be able to vote had Congress never exercised its authority, or had it

(continued...)

their state citizenship, and with it their right to vote. *See* Raven-Hansen, *supra*, at 174 ("District residents did not lose state citizenship until December, 1800").[45] We thus conclude, in accord with the academic authority upon whom plaintiffs otherwise heavily rely, that this "decade of voting and representation provided no precedent for the representation of District citizens." *Id.*[46]

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[44] (...continued)
subsequently ceded partial authority back to the state. *See* discussion of *Evans v. Cornman*, 398 U.S. 419 (1970), *infra* Part IV.B.4.

[45] In 1801, Maryland law provided that "[t]he election of representatives for the state to serve in congress, shall be made by the citizens of this state, qualified to vote for members of the house of delegates." A DIGEST OF THE LAWS OF MARYLAND 227 (Herty 1799). Maryland's Constitution, in turn, imposed, *inter alia*, a 12-month residency requirement on voting for members of the House of Delegates. *See* MD. CONST. of 1776, art. II, *reproduced in* 4 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 376 (William F. Swindler ed., 1975). The current Maryland Constitution provides that only those "resident of the State as of the time for the closing of registration next preceding the election, shall be entitled to vote." MD. CONST. art. I, § 1.

[46] The Committee for the Capital City, appearing as amicus curiae, contends that District residents retain their right to vote in Maryland because Maryland's laws were never effectively terminated in the District. *See* Br. of the Committee for the Capital City at 1-2. It notes that in accepting the ceded territory in 1790, Congress stated that "the laws of the state within such district shall not be affected . . . until Congress shall otherwise by law provide." *Id.* at 11 (quoting 1 Stat. 130, § 1). Congress never did "otherwise provide," the Committee argues, because the Organic Act of 1801 merely stated that "the laws of the state of Maryland, as they now exist, shall be and continue in force." *Id.* at 10 (quoting 2 Stat. 195, § 1). Hence, it contends, "Congress has never enacted legislation that repealed or superseded those Maryland laws, and therefore they still apply – by the express terms of the Act of 1801 establishing the District's local governance – to those persons living in that portion of the State of Maryland that was ceded to the federal government." *Id.* at 11-12.

This is simply a misinterpretation of the 1801 statute. By continuing the authority of Maryland's laws "as they now exist," Congress did nothing more than fix them (as they stood as of that date) as a part of the common law *of the District*, without such a provision the new District would have had no laws upon which to build. It did not, however, provide any continuing governmental or regulatory authority to Maryland. *See generally Brooks v. Laws*, 208 F.2d 18, 25 (D.C. Cir. 1953); *Hammond*, 26 F. Cas. at 98; *see also Reily*, 6 U.S. (2 Cranch) at 356-57. Indeed, Maryland had renounced any such authority. *See* 1791 Md. Acts ch. 45, § 2. In any event, in 1901 Congress expressly repealed the applicability to the District of acts of the Maryland Assembly, retaining only the common law and the (continued...)

Nor is there any other evidence of an intent, or an understanding, that former residents of Maryland and Virginia would continue to vote in those states after the District was established.[47] To the contrary, both the Maryland and Virginia statutes ratifying the cession made clear that their former territory was "forever ceded and relinquished to the Congress and Government of the United States, and full and absolute right and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon." 1791 Md. Acts ch. 45, § 2; *accord* 13 Va. Stat. at Large, ch. 32, at 43. The early judicial cases also made clear that "[b]y the separation of the district of Columbia from the state of Maryland, the complainant ceased to be a citizen of that state." *Reily*, 6 U.S. (2 Cranch) at 357; *accord Hammond*, 26 F. Cas. at 98; *see also Custis v. Lane*, 17 Va. (3 Munf.) 579 (1813) (holding that District resident could no longer vote in Virginia because he was no longer "a citizen of Virginia, abiding, or inhabiting therein, but passed, with that territory, from the jurisdiction of this commonwealth, by the act of cession"). Once again, such evidence as there is indicates that the contemporary understanding was that the territory's residents would lose their vote in their former states as soon as Congress assumed exclusive jurisdiction.[48] And, after that occurred and the

[46] (...continued)
British statutes in force in Maryland on February 27, 1801 (where consistent with provisions of the D.C. Code). *See* Act of March 3, 1901, ch. 854, 31 Stat. 1189, 1434. *See generally Brooks*, 208 F.2d at 25; *Williams v. United States*, 569 A.2d 97, 99 (D.C. 1989).

[47] One important piece of evidence of an understanding that District residents would not continue to vote in those states is contained in Article I, section 2, clause 2, which provides that no person may be a representative unless "an Inhabitant of that State in which he shall be chosen." U.S. CONST. art. I, § 2, cl. 2; *see also id.* art. I, § 3, cl. 3 (imposing same restriction on senators). Even if the residents of the District could be characterized as "residual citizens" of their former states, they surely are not "inhabitants" thereof. Plaintiffs' theory would make the District the only area where all of the voters are constitutionally unqualified to serve as their own representatives.

[48] *See supra* Part IV.A.2; *see also* ENQUIRIES INTO THE NECESSITY, *supra*, at 15-16 (warning that effect of assumption of jurisdiction by Congress would be that "the Territory of Columbia [would] cease[] to be component parts of the states respectively, to which it formerly belonged," and that residents would thereby lose (continued...)

residents did lose their vote, altogether missing from the public record is any outpouring of complaints that the franchise was being unlawfully withheld. *See supra* note 34 and accompanying text.

3. Intertwined with plaintiffs' above argument, that the creation of the District *was not* constitutionally intended to withdraw the right to vote in Maryland, is another argument: namely, that it *could not* have had that effect. The original residents of the District were among the people of the states by virtue of their citizenship in Maryland, plaintiffs argue, and they therefore had an inalienable right to vote that could not be withdrawn. Moreover, plaintiffs contend that right continues to inhere in those who currently are residents of the District. Our dissenting colleague offers a variation on this theme. Although he concludes that District residents should be permitted to vote in the District rather than Maryland, his rationale is the same: residents of the District had the right to vote prior to 1801; this was a right they were entitled to bequeath to their "political posterity"; and this right could not be removed by Maryland's act of cession or Congress' assumption of jurisdiction.

We cannot accept the argument that current residents of the District retain residual rights because other people, living 200 years earlier in the same place, had such rights. In the United States, personal rights generally do not "run with the land." Even if it could be argued that the right to vote was a privilege that irrevocably vested from "the moment the United States Constitution was ratified" in "every citizen living in what were then the thirteen states of the union," including the portions of Maryland and Virginia that would later become the District, Br. of the Committee for the Capital City at 1, the argument would not extend to the present plaintiffs. By virtue of the passage of 200 years, all of the plaintiffs – whether by birth or a combination of birth and their ancestors' migration – arrived on the scene after the land already had become a district whose residents, by constitutional contemplation,

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[48] (...continued)
their "share in electing the members of congress").

lacked a vote in the national Congress. Whatever rights the original residents of the area may have had, none of them are alive to press them before this court.

Moreover, upon close examination, this argument is not independent of the constitutional intent argument rejected above. At bottom, plaintiffs do not argue that notwithstanding the intent of the Constitution, the right to vote could not have been taken from District residents. They do not make that argument because their ultimate appeal is to the Constitution itself: they cannot argue both that the denial of their right to vote is unconstitutional, and that it is irrelevant whether the Constitution recognizes such a right.

Instead, plaintiffs argue that the Constitution gave them the right to vote upon its ratification in 1789, and that it was the Organic Act of 1801 – not the Constitution – that purportedly took it away. As one group of amici put it, "It was . . . the exercise of federal jurisdiction over the District – and not the text or intent of the Constitution itself – that denied D.C. residents their right to popular representation in the federal legislature." Mem. Amici Curiae for Professors James D.A. Boyle et al. at 16.

This, however, merely returns us to ground previously plowed. We have already concluded that it *is* the Constitution itself that is the source of plaintiffs' voting disability. Under Article I, voters for the House of Representatives must "have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST. art. I. § 2, cl. 1. Because those who live in the District lack state residency, they cannot qualify to vote in Maryland's (or any other state's) elections, and hence cannot vote for its representatives in the House. *See* MD. CONST. art. I, § 1.[49] Thus, it was not the Organic Act or any

[49] Although the Equal Protection Clause "restrains the States from fixing voter qualifications which invidiously discriminate," *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966) (declaring Virginia poll tax unconstitutional), the Court has not questioned "the power of a State to impose reasonable residence restrictions on the availability of the ballot," *id.* at 666. *See Carrington v. Rash*, 380 U.S. 89, 96 (1965) (emphasizing that states are "free to take reasonable and adequate steps . . . to see that all applicants for the vote actually fulfill the

(continued...)

other cession-related legislation that excluded District residents from the franchise, something we agree could not have been done by legislation alone. *Cf. Lucas v. Colorado*, 377 U.S. 713, 736 (1964) (holding that "an individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate").[50] Rather, exclusion was the consequence of the completion of the cession transaction – which transformed the territory from being part of a state, whose residents were entitled to vote under Article I, to being part of the seat of government, whose residents were not. Although Congress' exercise of jurisdiction over the District through passage of the Organic Act was the last step in that process, it was a step expressly contemplated by the Constitution. *See* U.S. CONST. art. I, § 8, cl. 17.[51]

4. We next consider an additional argument advanced in support of a right to vote in Maryland elections, this one based not only on the historical relationship between the District and Maryland, but also on the Supreme Court's ruling that residents of a federal enclave must be permitted to vote in the state from which the enclave was created. In *Evans v. Cornman*, the Supreme Court struck down under the Fourteenth Amendment's Equal Protection Clause a Maryland residency requirement that prevented persons living on the

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[49] (...continued)
requirements of bona fide residence"); *see also Saenz v. Roe*, 119 S. Ct. 1518, 1528 (1999) (noting that "Citizenship Clause of the Fourteenth Amendment expressly equates citizenship with residence").

[50] Nor did any of those statutes purport to disenfranchise District residents: none addressed the issue of voting rights at all.

[51] Plaintiffs also contend that the Overseas Citizens Voting Rights Act (OCVRA) of 1975, 42 U.S.C. § 1973ff-1, by which Congress required the states to permit overseas Americans to vote absentee in the last state in which they were domiciled, shows that Americans retain a residual citizenship in their former states where necessary to vindicate the right to vote in congressional elections. *See Alexander* Pls.' Summ. J. Mem. at 51-53. Congress premised the OCVRA on a "reasonable extension of the bona fide residence concept." *Attorney Gen. of Guam*, 738 F.2d at 1019 (quoting H.R. Rep. No. 94-649, at 7 (1975)). There is a significant distinction between extending the right to vote to individuals who themselves once lived in a specific state, and extending it to other individuals who never have, based on the fact that still others were residents of Maryland 200 years ago.

grounds of the National Institute of Health (NIH) from voting in state and federal elections. 398 U.S. 419 (1970). NIH had become a federal reservation in 1953, when Maryland ceded jurisdiction over the property to the United States. *See id.* at 420-21. Fifteen years later, the state denied NIH residents the right to vote.

The Court began its analysis by noting that:

> Appellees clearly live within the geographical boundaries of the State of Maryland, and they are treated as state residents in the census and in determining congressional apportionment. They are not residents of Maryland only if the NIH ceased to be a part of Maryland when the enclave was created. However, that "fiction of a state within a state" was specifically rejected by this Court in *Howard v. Commissioners of Louisville*, 344 U.S. 624, 627 (1953), and it cannot be resurrected here to deny appellees the right to vote.

Id. at 421-22. It then proceeded to consider whether the state could deny plaintiffs the vote on the ground that they were neither substantially interested in nor affected by state electoral decisions. *See id.* at 422. Maryland alleged that the plaintiffs were substantially less interested in state affairs than other Maryland residents because, under the Enclaves Clause, U.S. CONST. art. I, § 8, cl. 17, Congress had the power to exercise exclusive jurisdiction over the NIH.

The Supreme Court rejected the state's argument, noting that "the relationship between federal enclaves and the States in which they are located" had "changed considerably" over the years. *Evans*, 398 U.S. at 423. In particular, it noted that Congress had passed a series of statutes expressly permitting states to extend many of their laws to cover enclave residents, including their criminal, tax, unemployment, and workers' compensation laws. *See id.* at 424 (citing 18 U.S.C. § 13; 4 U.S.C. §§104-110; 26 U.S.C. § 3305(d); and 40 U.S.C. § 490). Moreover, it noted that plaintiffs were "required to register their automobiles in Maryland and obtain drivers' permits and license plates from

the State; they are subject to the process and jurisdiction of State courts; they themselves can resort to those courts in divorce and child adoption proceedings; and they send their children to Maryland public schools." *Id.* All of this led the Court to conclude that

> In their day-to-day affairs, residents of the NIH grounds are just as interested in and connected with electoral decisions as they were prior to 1953 when the area came under federal jurisdiction and as are their neighbors who live off the enclave. In nearly every election, federal, state, and local, for offices from the Presidency to the school board, and on the entire variety of other ballot propositions, appellees have a stake equal to that of other Maryland residents.

Id. at 426. Accordingly, *Evans* held that NIH residents were "entitled under the Fourteenth Amendment to protect that stake by exercising the equal right to vote." *Id.*

Plaintiffs here argue that since the residents of federal enclaves are entitled to vote under *Evans*, the residents of the District should be so entitled as well. There is some appeal to that argument, as Congress's authority to govern enclaves is identical to its authority over the District, and is conferred by the same clause of the Constitution. *See* U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may, by Cession of particular States . . . become the Seat of the Government . . . , and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . .").[52]

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[52] Although the constitutional text indicates that Congress has "like Authority" over both the District and the enclaves, the text does refer to them differently. The District is described as being created by "Cession" of particular states, a word which indicates that thereafter the District would no longer be part of those states. Enclaves, on the other hand, are areas purchased with the consent of the legislature of the state "in which the Same shall be," which may explain why *Evans* viewed enclaves as remaining parts of the states from which they were created. We need not resolve the significance of this difference in constitutional

(continued...)

But the fact that Congress may have identical *authority* over both the District and the enclaves is not dispositive, because the ultimate result in *Evans* rested on the fact that Congress had not *exercised* that authority over NIH.[53] As noted above, Congress had passed statutes permitting Maryland to exercise its own authority in the enclave, and Maryland had done so extensively. It was Maryland's exercise of authority over the plaintiffs in that case – in areas as disparate as motor vehicle regulation, state court jurisdiction, and public education – that gave them "a stake equal to that of other Maryland residents." *Evans*, 398 U.S. at 426. The case before us is plainly not analogous in this respect. Congress has ceded none of its authority over the District back to Maryland, and Maryland has not purported to exercise any of its authority in the District.[54]

Plaintiffs do not dispute this distinction, and as a consequence do not contend that they have a right to vote in elections for the Maryland state legislature. Instead, they argue that while the absence of the exercise of Maryland authority over District residents might mean they have an insufficient interest in elections to Maryland's own legislature,

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[52] (...continued)
language, however, because the difference in the way in which Congress has exercised its authority over enclaves and the District distinguishes this case from *Evans* in any event. *See* discussion *infra* pp. 59-60.

[53] Indeed, the three-judge district court whose decision the Supreme Court affirmed expressly distinguished that case from a hypothetical in which the federal government did assert exclusive jurisdiction over an enclave. *See Cornman v. Dawson*, 295 F. Supp. 654, 656 (D. Md. 1969). For the same reason, the fact that Maryland's initial statute ceding NIH, like the statute ceding the District, gave the federal government the ability to exercise exclusive authority over NIH is not decisive, since Congress plainly did not do so.

[54] We disagree with the dissent's suggestion that Congress' delegation of authority to the District government puts the District's situation on a par with that of the NIH enclave in *Evans*. In the latter circumstance, Congress delegated authority to another sovereign (Maryland), and the Court held that sovereign could not treat two classes of residents (those within and without the enclave) differently. Here, by contrast, Congress has merely delegated some of its power to its own creature, the District government. The governmental structure through which Congress chooses to exercise its authority over the District – provided it does not delegate that authority to another sovereign – cannot be determinative of the voting rights of District residents.

"District citizens have an equally vital stake in elections to Congress" as other Maryland residents. *Alexander* Pls.' Summ. J. Mem. at 27. Finding District residents qualified to vote for Congress but not for the Maryland legislature, however, would turn Article I on its head. As we have noted, Article I, section 2 states that "the [congressional] Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST. art. I, § 2, cl. 1. Plaintiffs' enclave theory, by contrast, would permit residents of the District to vote in Maryland's congressional elections notwithstanding that they lack – even under an *Evans* theory – precisely those qualifications.

Finally, and most important, adopting plaintiffs' argument would require us to ignore the result in *Albaugh*, which barred District residents from voting in Maryland's elections for the United States Senate. *See* discussion *supra* pp. 43-45. We do not have the authority to do so. Although there may be tension between *Evans* and *Albaugh*,[55] it is a tension that arises only if *Evans* is extended beyond its own holding in two ways: to a situation in which the ceding state no longer asserts any jurisdiction, and to a remedy limited to the right to vote in federal elections. *Albaugh*, on the other hand, is directly on point here without any extensions: it directly and expressly denies District residents a right to vote in Maryland's federal elections.

Plaintiffs contend that it is *Evans*, rather than *Albaugh*, that is the harbinger of the Supreme Court's future course. Whether that is true, however, is not for us to judge. As the Supreme Court has repeatedly admonished the lower courts,

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[55] There appear to have been two steps to the *Evans* analysis. First, in rejecting the "fiction of a state within a state," the court rejected the suggestion that the NIH grounds ceased to be part of Maryland when the enclave was created. *See Evans*, 398 U.S. at 421. The rationale for this declaration was unstated, other than by reference to the Court's prior similar statement in *Howard*. Standing alone, this declaration would appear to be in tension with the affirmance in *Albaugh*, although a difference in the constitutional language describing the District and the enclaves could explain it. *See supra* note 52. As discussed above, however, the Court did not rest its decision on this first step, but instead went on to consider whether enclave residents had a stake in the elections equal to that of other Maryland residents. *See Evans*, 398 U.S. at 426.

"if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). We must apply the law as it now stands and, until the Supreme Court instructs otherwise, that law is set forth in *Albaugh*.

5. Plaintiffs rightly note that the cession of the lands of Virginia and Maryland "did not take away any of the individual constitutional rights guaranteed to District citizens." *Alexander* Pls.' Summ. J. Mem. at 46. As the Supreme Court declared in *O'Donoghue v. United States*, "[t]he mere cession of the District of Columbia to the Federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution." 289 U.S. 516, 541 (1933) (quoting *Downes v. Bidwell*, 182 U.S. 244, 260-61 (1901)).[56] Yet, as the same opinion also noted, "when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative" in the District or territories, "but whether the provision relied on is applicable." *Id.* at 542 (quoting *Downes*, 182 U.S. at 292). For the reasons set forth above, we conclude that the constitutional provisions plaintiffs rely upon here – the clauses of Article I that provide for congressional voting – are not applicable to residents of the District of Columbia.

V

In this Part, we consider plaintiffs' arguments based on provisions of the Constitution other than Article I. These

[56] *See O'Donoghue*, 289 U.S. at 541 (holding that judges of District of Columbia are Article III judges whose salaries cannot be decreased). *But see id.* at 539-40 ("The object of the grant of exclusive legislation over the district was, therefore, national in the highest sense, and the city organized under the grant became the city, *not of a state*, not of a district, but of a nation.") (internal quotation omitted) (emphasis added).

include the Equal Protection, Privileges or Immunities, Due Process, and Republican Guarantee Clauses.

A

We first address the contention of the plaintiffs (and of our dissenting colleague) that the District's lack of representation in the House deprives its residents of the equal protection of the laws. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (applying equal protection analysis to federal government under Fifth Amendment's Due Process Clause); *see also Buckley v. Valeo*, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment is the same as that under the Fourteenth Amendment."). The plaintiffs allege that the lack of representation renders them unequal to the residents of the fifty states and of the federal enclaves.[57] And they further contend that because the right to vote is fundamental, such unequal treatment cannot be upheld unless it satisfies strict scrutiny – that is, unless it is "narrowly tailored to serve a compelling" government interest. *Alexander* Pls.' Summ. J. Mem. at 56 (quoting *Washington v. Glucksberg*, 117 S. Ct. 2258, 2268 (1997)). Because there is no compelling interest in denying District residents the vote, plaintiffs contend that the denial cannot satisfy strict scrutiny and hence must fall.[58]

We do not disagree that defendants have failed to offer a compelling justification for denying District residents the right to vote in Congress. As the dissent argues, denial of the franchise is not necessary for the effective functioning of the seat of government.[59] The problem, however, is that strict

[57] The *Adams* plaintiffs, but not the *Alexander* plaintiffs, also allege that their lack of representation renders them unequal to the residents of Alexandria County, Virginia (formerly a part of the District) as well as to the residents of the states "which started their organized political lives as territories of the Unites States." *Adams* Mot. for Summ. J. at 51.

[58] Plaintiffs do not, however, contend that the Equal Protection Clause bars states from imposing state residency as a qualification for voting. *See supra* note 49.

[59] As noted above, the principal rationale noted by Madison for exclusive congressional control over the District – ensuring that Congress would not have to depend upon another sovereign for its protection – does not appear to be relevant to the issue of voting rights. *See supra* note 25.

scrutiny does not apply in this case. Although equal protection analysis scrutinizes the validity of classifications drawn by executive and legislative authorities, *see, e.g.*, *Parham v. Hughes*, 441 U.S. 347, 358 (1979), the classification complained of here is not the product of presidential, congressional, or state action. Instead, as we have just concluded, the voting qualification of which plaintiffs complain is one drawn by the Constitution itself. The Equal Protection Clause does not protect the right of all citizens to vote, but rather the right "of all *qualified* citizens to vote." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (emphasis added). "[T]he right to vote in federal elections is conferred by Art. I, § 2, of the Constitution," *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966), and the right to equal protection cannot overcome the line explicitly drawn by that Article. For that reason, even the absence of a compelling ground for denying District citizens the right to vote cannot result in the judicial grant thereof.

This point is expressly made by the very cases plaintiffs cite in support of their equal protection argument: those establishing the doctrine of "one person, one vote." In those cases, the Supreme Court held that doctrine to require that, "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964); *see also Gray v. Sanders*, 372 U.S. 368 (1963) (applying same principle to state elections). Plaintiffs assert that, even if Article I were intended to deprive District residents of congressional representation – a result inconsistent with the one person, one vote principle – that deprivation cannot continue in light of the expansive application of the principle in modern equal protection analysis.

But the one person, one vote cases themselves make clear that the structural provisions of the Constitution necessarily limit the principle's application in federal elections. In *Reynolds v. Sims*, for example, the Court recognized that the allocation "to each of the 50 States, regardless of population" of two senators and at least one representative was

inconsistent with one person, one vote. 377 U.S. at 571-72. Nonetheless, the Court said, "The system of representation in the two Houses of the Federal Congress is one ingrained in our Constitution, as part of the law of the land." *Id.* at 574. Moreover, and particularly relevant here, the Court declared that "[t]he developing history and growth of our republic cannot cloud the fact that, at the time of the inception of the system of representation in the Federal Congress, a compromise between the larger and smaller states on this matter averted a deadlock in the Constitutional Convention which had threatened to abort the birth of our Nation." *Id.* This, the Court said, rendered the composition of the House and Senate constitutionally compelled, and thus "inapposite and irrelevant to state legislative districting schemes." *Id.* at 573.

In *Gray v. Sanders*, the Court had previously reached the same conclusion regarding the electoral college system used in presidential elections, which does not allocate voting strength in strict proportion to population, but which is nonetheless mandated by Article II, section 1 and the Twelfth Amendment. *See* 372 U.S. at 378.[60] And subsequently, in *Department of Commerce v. Montana*, 503 U.S. 442 (1992), the Court noted two additional (and one of the same) limitations upon the one person, one vote principle. That "general admonition," the Court said, "is constrained by three requirements. The number of Representatives shall not exceed one for every 30,000 persons; each State shall have at least one Representative; and the district boundaries may not cross state lines." *Id.* at 447-48[61]; *see also Wisconsin v. City of New York*, 517 U.S. 1, 14-15 (1996) ("[T]he Constitution itself, by guaranteeing a minimum of one representative for each State, made it virtually impossible in interstate apportionment

[60] "The inclusion of the electoral college in the Constitution, as the result of specific historical concerns," the Court said, "validated the collegiate principle despite its inherent numerical inequality . . . ." *Gray*, 372 U.S. at 378.

[61] The Court noted that "[t]he first and second requirements are set forth explicitly in Article I, § 2, of the Constitution," and that "[t]he requirement that districts not cross state borders appears to be implicit in the text and has been recognized by continuous historical practice." *Montana*, 503 U.S. at 448 n.14.

to achieve the [one person, one vote] standard imposed by *Wesberry*.").

In sum, notwithstanding the force of the one person, one vote principle in our constitutional jurisprudence, that doctrine cannot serve as a vehicle for challenging the structure the Constitution itself imposes upon the Congress. *See Breakefield v. District of Columbia*, 442 F.2d 1227, 1228 & n. 4 (D.C. Cir. 1970) (rejecting contention that lack of representation rendered congressional tax on District unlawful under "one-man one-vote" decision in *Wesberry*). This analysis also forecloses plaintiffs' contention that the disparity between their treatment and that of enclave residents violates equal protection.[62] As we held in Part IV.A, the inability of District residents to vote is a consequence of Article I. Similarly, as we discussed in Part IV.B.4, the contrasting ability of enclave residents to vote is not the consequence of legislative line drawing, but rather of the Supreme Court's decision in *Evans* that enclave residents have a constitutional right to vote – a holding we are unable to extend to District residents both because of distinctions between the manner in which Congress has exercised its authority over the enclaves and the District, and because of the Supreme Court's decision in *Albaugh*. *See* discussion *supra* Part IV.B.4. Hence, the differing treatment is the consequence not of legislative determinations but of constitutional distinctions. This court is without authority to scrutinize those distinctions to determine whether they are

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[62] The dissent contends that the Equal Protection Clause is also violated by the disparity in treatment between District residents and overseas voters. As discussed *supra* note 51, in the Overseas Citizens Voting Rights Act (OCVRA), 42 U.S.C. § 1973ff-1, Congress required the states to permit Americans living overseas to vote absentee in the last state in which they were domiciled. Although the constitutionality of the OCVRA has not been tested, it depends upon the validity of Congress' premise that the Act is a "reasonable extension of the bona fide residence concept" for individuals who once lived in a specific state. *Attorney Gen. of Guam*, 738 F.2d at 1019 (quoting H.R. REP. No. 94-649, at 7 (1975)). The instant lawsuits, brought on behalf of all District residents regardless whether they have ever lived in a state, cannot rely on such a premise.

irrational, compelling, or anything in between.[63]

B

Plaintiffs also contend that the right to vote for members of Congress is a privilege of national citizenship. Although the Fourteenth Amendment's Privileges or Immunities Clause[64] is phrased as a protection of such privileges against abridgement by the states,[65] plaintiffs further contend that its protections "are incorporated against the federal government by the fifth amendment in the same fashion as are the principles of equal protection." *Alexander* Pls.' Opp'n at 11 (citing *Bolling*, 347 U.S. at 500).[66] The denial of District residents' right to vote, plaintiffs conclude, abridges this right of national citizenship in violation of the Constitution.

We do not disagree that the "right to vote for national officers" is a "right[] and privilege[] of national citizenship." *Twining v. New Jersey*, 211 U.S. 78, 97 (1908) (citing *Ex parte Yarbrough*, 110 U.S. 651 (1884)); *accord In re Quarles*, 158 U.S. 532, 535 (1895). Nor do we dispute Justice Kennedy's

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[63] One of the claims in the *Adams* complaint does challenge a species of legislative action: Congress' continued exercise of exclusive federal authority over the District – or at least over the private residential portions of the District outside of the National Capital Service Area (the part of the District containing the principal federal buildings and offices). The *Adams* plaintiffs contend that Congress' decision to exercise exclusive authority over the District in local matters, yet to cede similar authority to the states in the federal enclaves, violates equal protection. This claim, however, challenges Congress' continuing authority over the District *regardless* of whether District residents may vote for Congress. *See Adams* Pls.' Opp'n at 72 n.41 (stating that even if District residents had representatives in Congress, Congress' exercise of authority over local District matters would be unconstitutional as long as representatives from places other than District are members of that body). It thus does not come within our jurisdictional mandate to decide apportionment challenges, and we therefore remand it to the single-judge district court. *See* discussion *supra* Part II.

[64] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." U.S. CONST. amend. XIV, § 1.

[65] Plaintiffs do not rely on the "Privileges and Immunities" Clause of Article IV. *See* U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

[66] Although the House defendants dispute this proposition, *see* House Opp'n to Pls.' Mot. for Summ. J. at 34, our disposition of plaintiffs' claim makes it unnecessary to decide the issue.

statements, in a concurrence repeatedly cited by plaintiffs, that this right arises out of the "relationship between the people of the Nation and their National Government, with which the States may not interfere." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 845 (1995) (Kennedy, J., concurring); *see id.* at 844 ("[T]he federal right to vote . . . do[es] not derive from the state power in the first instance but . . . belong[s] to the voter in his or her capacity as a citizen of the United States.").[67] Indeed, as we noted above, it is Article I, section 2 that confers "the right to vote in federal elections." *Harper*, 383 U.S. at 665; *accord U.S. v Classic*, 313 U.S. 299, 314-15 (1941). That, however, can hardly be the end of the inquiry, as even plaintiffs concede that residents of the territories do not have the right to vote in congressional elections, notwithstanding that they, too, are national (American) citizens. *Cf. Igartua de la Rosa v. United States*, 32 F.3d 8 (1st Cir. 1994); *Attorney Gen. of Guam v. United States*, 738 F.2d 1017 (9th Cir. 1984).[68]

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[67] *See also U.S. Term Limits, Inc.*, 514 U.S. at 805 (noting that "'[w]hile, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states,'" in fact it "was a new right, arising from the Constitution itself") (quoting *United States v. Classic*, 313 U.S. 299, 314-15 (1941)); *id.* at 820-21 (noting "that the right to choose representatives belongs not to the States, but to the people").

[68] While our dissenting colleague does not dispute the national citizenship of territorial residents, he does distinguish them from District residents on two grounds. First, he argues that the territories were never part of the "several States," and hence that their current residents are not the political posterity of individuals who at one time were "people of the several States." Whether or not this distinction is constitutionally significant, a point addressed *supra* Part IV.B, it proceeds from the premise that it is Article I (from which the quoted phrases are taken) that gives content to the "national" right to vote. But Article I, as we explain below, is precisely what withholds that right from District residents. The dissent also contends that the territories may be distinguished from the District on the ground that they were expected eventually to become states, thus rendering their condition temporary. Although it may be possible to distinguish the territories in this way, the Supreme Court relied on just that distinction to hold that although territorial residents came within the protection of (the then-existing version of) 42 U.S.C. § 1983, District residents did not. *See District of Columbia v. Carter*, 409 U.S. 418, 431-32 (1973) ("[I]n light of the transitory nature of the territorial condition, Congress could reasonably treat the Territories as inchoate States, quite similar in many respects to the States themselves, to whose status they would inevitably

(continued...)

Rather, it is precisely because it is Article I that confers the federal right to vote that we must look to that Article to provide its content and define its boundaries. Article I grants that right only to those who "have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST. art. I, § 2, cl. 1.[69] Furthermore, it apportions representatives only "among the several States which may be included within this Union." *Id.* art. I, § 2, cl. 3. Thus, in Justice Kennedy's own words, the "Constitution uses state boundaries to fix the size of congressional delegations." *U.S. Term Limits, Inc.*, 514 U.S. at 841 (Kennedy, J., concurring).[70] Because we have previously concluded that the District cannot be characterized as a state for these purposes, and because therefore the constitutional provision that creates the federal right to vote does not include District residents within its terms, denial of the vote to those residents does not abridge their national privileges or immunities.

In further support of the privileges or immunities argument, plaintiffs reason by analogy to the arguments that prevailed in *U.S. Term Limits, Inc.* In that case, the Supreme Court struck down an Arkansas law that limited the state's congressional representatives to a fixed number of terms. In so doing, the Court relied not on the Privileges or Immunities Clause, but on the two Qualifications Clauses that set forth

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[68] (...continued)
ascend. The District of Columbia, on the other hand, is an exceptional community . . . established under the Constitution as the seat of the National Government.") (internal quotation omitted).

[69] This does not, as both Justice Kennedy's concurrence and prior opinions of the Court make clear, mean that "electors for members of Congress owe their right to vote to the State law." *U.S. Term Limits, Inc.*, 514 U.S. at 842 (Kennedy, J., concurring) (quoting *Ex parte Yarbrough*, 110 U.S. at 663-64). Rather, "even though the Constitution uses the qualifications for voters of the most numerous branch of the States' own legislatures to set the qualifications of federal electors, Art. I, § 2, cl. 1, when these electors vote, we have recognized that they act in a federal capacity and exercise a federal right." *Id.* at 842. In short, the Constitution incorporates, or "adopts the qualification thus furnished as the qualification of its own electors for members of Congress." *Ex parte Yarbrough*, 110 U.S. at 663.

[70] *See also U.S. Term Limits, Inc.*, 514 U.S. at 840 (Kennedy, J., concurring) ("[T]he Constitution takes care both to preserve the States and to make use of their identities and structures at various points in organizing the federal union.").

the qualifications for members of Congress. *See* U.S. CONST. art. I, § 2, cl. 2; *id.* art. I, § 3, cl. 3.[71] Just as Arkansas "violated its citizens' privileges of national citizenship when it attempted to restrict their right to vote for the congressional representatives of their choice," plaintiffs argue, "[t]he defendants here violate the same constitutional privilege by denying the right of District residents to vote in Congressional elections." *Alexander* Pls.' Summ. J. Mem. at 41.

For two reasons, *U.S. Term Limits* has no application to the instant controversy. First, the congressional Qualifications Clauses at issue in that case are the structural opposites of the voter Qualifications Clause at issue here. The former set forth specific lists of qualifications that members of Congress must satisfy. *See supra* note 71. The Court held those lists to be exclusive, striking down Arkansas' term limits on the ground that the state was without authority to add to them. *See U.S. Term Limits, Inc.*, 514 U.S. at 806. By contrast, the voter Qualifications Clause, U.S. CONST. art. I, § 2, cl. 1, contains no such list, but rather merely incorporates the relevant state's own set of voter qualifications. *See U.S. Term Limits, Inc.*, 514 U.S. at 806 (noting "explicit[] contrast[]" between "state control over the qualifications of electors [and] the lack of state control over the qualifications of the elected").

Second, and more fundamentally, the denial of District residents' right to vote is not the consequence of the addition of any extra-constitutional qualification on voting, as in *U.S. Term Limits*. Rather, it is the result of applying precisely those qualifications contained in the Constitution itself. *See supra* Part IV. Accordingly, plaintiff's exclusion from the franchise violates neither the principles of *U.S. Term Limits*, nor the dictates of the Privileges or Immunities Clause.

[71] The Qualifications Clause for the House of Representatives reads: "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." U.S. CONST. art. I, § 2, cl. 2. The analogous clause for the Senate reads: "No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen." *Id.* art. I., § 3, cl. 3.

C

Plaintiffs contend that the right to vote in congressional elections is also protected by the Due Process Clause of the Fifth Amendment, which provides that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Because the right to vote for one's own legislators is one of those protected liberties, plaintiffs argue, its denial violates their right to both procedural and substantive due process. *See Alexander* Pls.' Summ. J. Mem. at 27.

Like the privileges or immunities argument, this contention founders upon its underlying assumption: that District residents have a right to vote in congressional elections. As we have repeatedly stated above, the Constitution does not grant that right except to individuals who qualify under Article I – which District residents do not. Nor can the Due Process Clause, any more than the Equal Protection Clause, be used to change elements of the composition of Congress that are dictated by the Constitution itself. *Cf. Carliner v. Commissioner*, 412 F.2d 1090, 1090 (D.C. Cir. 1969) (rejecting argument that Due Process Clause rendered District's mayor-commissioner and city council unlawful "because the citizens of the District have not been given the opportunity by popular vote to elect" them).[72]

D

Plaintiffs' final claim is based on the Republican Guarantee Clause of Article IV, which states: "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. CONST. art. IV, § 4. Although recognizing that the Clause is phrased as a guarantee to the states, plaintiffs once again contend that the "Framers cannot have intended anything less for the citizens of the federal government." *Alexander* Pls.' Summ. J. Mem. at 43. Plaintiffs

[72] The Supreme Court has also held that the "procedural component of the Due Process Clause does not 'impose a constitutional limitation on the [legislative] power of Congress . . . .'" *Atkins v. Parker*, 472 U.S. 115, 129 (1985) (quoting *Richardson v. Belcher*, 404 U.S. 78, 81 (1971)).

argue that the guarantee of a republican form of government is incompatible with their exclusion from representation in Congress.

As the Supreme Court has noted, "[i]n most of the cases in which the Court has been asked to apply the [Guarantee] Clause, the Court has found the claims presented to be nonjusticiable under the 'political question' doctrine." *New York v. United States*, 505 U.S. 144, 184 (1992); *accord Baker v. Carr*, 369 U.S. 186, 218-27 (1962). But even if plaintiffs' claim is justiciable,[73] it does not present a substantial federal question.[74] While we cannot be certain precisely what the Framers thought constituted a "Republican Form of Government," we do know that they intended the District to be subject to the exclusive control of Congress, *see* U.S. CONST. art. I, § 8, cl. 17; that they reserved the power to elect congressional representatives exclusively to those qualified to vote in state elections, *see id.* art. I, § 2, cl. 1; and that District residents are not so qualified, *see* discussion *supra* Part IV. Accordingly, we cannot adopt plaintiffs' Republican Guarantee argument without concluding that Article IV of the Constitution was intended to repeal the provisions of Article I. That, of course, we cannot do.

E

Plaintiffs argue that, even if we cannot find that Article I guarantees their right to vote in congressional elections, we should harmonize that Article with the other provisions discussed in this Part, which, they contend, do protect such a right. We do not disagree that we should strive to read the Constitution in a way that harmonizes its various provisions.

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[73] *Cf. New York*, 505 U.S. at 185 (suggesting, without deciding, that "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions").

[74] *Cf. Carliner*, 412 F.2d at 1091 (holding insubstantial the claim that then-existing city council was unlawful because not elected by District residents); *Breakefield*, 442 F.2d at 1229. *See generally Shook v. District of Columbia Fin. Responsibility & Management Assistance Auth.*, 132 F.3d 775, 781 (D.C. Cir. 1998) (holding that "Congress' authorization to the Control Board to reduce, even drastically, the powers of the [elected] Board of Education does not raise an independent constitutional issue").

We believe, however, that we have done so in the only way the words and historical interpretation of that document permit. Although the provisions considered in this Part protect rights guaranteed by the Constitution, our reading of Article I precludes the conclusion that the right plaintiffs seek to vindicate is one of those. Because the provisions of the Constitution that set forth the composition of Congress do not contemplate representation for District residents, we conclude that the denial of representation does not deny them equal protection, abridge their privileges or immunities, deprive them of liberty without due process, or violate the guarantee of a republican form of government.

VI

As we have noted, many courts have found a contradiction between the democratic ideals upon which this country was founded and the exclusion of District residents from congressional representation. All, however, have concluded that it is the Constitution and judicial precedent that create the contradiction.[75] Moreover, that precedent is of particularly strong pedigree. As Justice Jackson said in following Chief Justice Marshall's opinion that the District was not a state within the meaning of Article III:

> Among his contemporaries at least, Chief Justice Marshall was not generally censured for undue literalness in interpreting the language of the Constitution to deny federal power and he wrote from close personal knowledge of the Founders and the foundation of our constitutional structure. Nor did he underestimate the equitable claims which his decision

[75] *See* cases cited *supra* Part IV.A.3; *see also United States v. Thompson*, 452 F.2d 1333, 1341 (D.C. Cir. 1971) ("[F]or residents of the District, the right to vote in congressional elections is . . . totally denied. This regrettable situation is a product of historical and legal forces over which this court has no control."); *cf. Representation for the District of Columbia: Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 95th Cong. 131 (1978) (statement of Patricia M. Wald, Assistant Attorney General) (explaining that "constitutional amendment is necessary" to provide District with voting representation because "we do not believe that the word 'state' as used in Article I can fairly be construed to include the District").

denied to residents of the District . . . .
Tidewater, 337 U.S. at 586-87 (plurality opinion of Jackson, J.) (citing *Hepburn & Dundas*, 6 U.S. (2 Cranch) at 453).

Like our predecessors, we are not blind to the inequity of the situation plaintiffs seek to change. But longstanding judicial precedent, as well as the Constitution's text and history, persuade us that this court lacks authority to grant plaintiffs the relief they seek. If they are to obtain it, they must plead their cause in other venues. Accordingly, plaintiffs' motions for summary judgment are denied, and defendants' motions to dismiss are granted with respect to those claims that challenge the constitutionality of the apportionment of the House of Representatives. The remaining claims are remanded to the single district judge before whom they were originally filed.

An order accompanies this memorandum.

March 20, 2000.

S/ MERRICK B. GARLAND
United States Circuit Judge

S/ COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOIS E. ADAMS, *et al.*, Plaintiffs, v. WILLIAM JEFFERSON CLINTON, *et al.*, Defendants.	)	Civ. No. 98–1665 (LFO, MBG, CKK)
CLIFFORD ALEXANDER, *et al.*, Plaintiffs, v. WILLIAM M. DALEY, *et al.*, Defendants.	)	Civ. No. 98–2187 (LFO, MBG, CKK)

JUDGMENT

FILED
Mar[ch] 20, 2000
Nancy Mayer-Whittington, Clerk
U.S. District Court

For the reasons stated in the accompanying Memorandum Opinion, it is, this 20th day of March, 2000, hereby

ORDERED that the Motion by Twenty Citizens of the District of Columbia for Summary Judgment in Civ. No. 98-1665 [#94] is DENIED with respect to those claims that challenge the constitutionality of the apportionment of congressional districts; and it is further

ORDERED that President Clinton's Motion to Dismiss in Civ. No. 98-1665 [#34] is GRANTED with respect to those claims that challenge the constitutionality of the apportionment of congressional districts; and it is further

ORDERED that the Motion to Dismiss of Defendants Robin H. Carle and Wilson Livingood in Civ. No 98-1665 [#33] is GRANTED with respect to those claims that challenge the constitutionality of the apportionment of congressional districts; and it is further

ORDERED that the Motion of Plaintiffs Alexander et al. for Summary Judgment in Civ. No. 98-2187 [#52] is DENIED with respect to those claims that challenge the constitutionality of the apportionment of congressional districts; and it is further

ORDERED that the Motion to Dismiss of defendants William M. Daley and the United States in Civ. No. 98-2187 [#78] is GRANTED with respect to those claims that challenge the constitutionality of the apportionment of congressional districts; and it is further

ORDERED that the Motion to Dismiss of Defendants Robin H. Carle, Wilson Livingood and James M. Eagen III in *Alexander, et al v. Daley, et al.* in Civ. No. 98-2187 [#84] is GRANTED with respect to those claims that challenge the constitutionality of the apportionment of congressional districts; and it is further

ORDERED that all remaining motions and claims be REMANDED to the single district judge to whom the cases were originally assigned.

SO ORDERED.

S/ MERRICK B. GARLAND
United States Circuit Judge

S/ COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOIS E. ADAMS, *et al.*, Plaintiffs, v. WILLIAM JEFFERSON CLINTON, *et al.*, Defendants.	)	Civ. No. 98–1665 (LFO, MBG, CKK)
CLIFFORD ALEXANDER, *et al.*, Plaintiffs, v. WILLIAM M. DALEY, *et al.*, Defendants.	)	Civ. No. 98–2187 (LFO, MBG, CKK)

FILED
Mar[ch] 20, 2000
Nancy Mayer-Whittington, Clerk
U.S. District Court

OBERDORFER, J, dissenting in part, and concurring in part[1]:*

> *We the People of the United States, in Order to . . . secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.*

U.S. Const. preamble.

* [as amended by Errata filed April 20, 2000 and May 3, 2000]

[1] I agree with the majority that the plaintiffs have standing to pursue their claims for representation in the House of Representatives. *See* Maj. Op. Part III. I also agree that the claims against the Senate defendants and the District of Columbia Financial Responsibility and Management Assistance Authority (the Control Board) do not involve apportionment, the sole business of this three-judge court. *See* Maj. Op. Part II. Accordingly, those claims are addressed in a separate memorandum and order, also filed today. *See Adams v. Clinton*, Nos. 98-1665, 98-2187 (D.D.C. Mar. 20, 2000).

In 1964, the Supreme Court first recognized that Article I of the Constitution requires States to honor a "one person, one vote" rule in their conduct of elections for the House of Representatives, saying that:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

Wesberry v. Sanders, 376 U.S. 1, 17-18 (1964) (emphasis added). More than 30 years after *Wesberry*, and more than 200 years after ratification of the Constitution, plaintiffs charge, *inter alia*, that the Secretary of Commerce is obstructing several hundred thousand American citizens – the inhabitants of the District of Columbia – from their exercise of this "precious" right, and they seek vindication of that right. An examination of the relevant facts and law yields, to me, the following conclusions:

(1) Article I, section 2, of the Constitution states, in relevant part: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ." U.S. Const. art. I, § 2. Section 2 of the Fourteenth Amendment, which replaced but did not materially alter part of Article I, section 2, provides, in relevant part: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." *Id.* amend. XIV.

(2) During the years between when the Constitution took effect in 1789 and the federal government's assumption of exclusive jurisdiction over the area that became the District of Columbia in 1801, inhabitants of that area were "People of the several States," who, among other things, were apportioned as mandated, U.S. Const. art. I, § 2, and were entitled to, and enjoyed, the right to vote for voting representation in the House of Representatives, either through Maryland or Virginia,

see infra Part I.B.3.

(3) The "People of the several States" who voted between 1789 and 1801 in the part of Maryland which became the District[2] thereby secured for themselves and their political posterity a constitutionally-protected right to be included in a cohort to which a Representative in Congress is apportioned and, if otherwise eligible, to vote for voting representation in the House of Representatives.

(4) In 1791, Maryland had ratified its cession to the United States of the portion of its territory which is now the District of Columbia, specifically including "persons residing or to reside thereon," but provided that it would continue to exercise jurisdiction until "Congress shall, by law, provide for the government thereof." An Act Concerning the Territory of Columbia and the City of Washington, 1791 Md. Acts ch. 45, § 2, *reprinted in* 1 D.C. Code Ann. 34, 35 (1991).

(5) The District became the permanent Seat of Government in December 1800, *see* An Act for Establishing the Temporary and Permanent Seat of Government of the United States, 1 Stat. 130, ch. 28, § 6 (1790), and the cession was finally consummated by the Organic Act of 1801, 2 Stat. 103, ch. 15 (1801). At no time did either Maryland or the United States make any provision for either termination or continuation of the apportionment, or of the voting rights, of the "persons" ceded by Maryland to the United States. No provision in any cession instrument purported to take away the pre-existing right of those "persons" to be apportioned and to vote for voting representation in the House of Representatives. In any event, the decisions of the Supreme Court in *O'Donoghue v. United States*, 289 U.S. 516, 540 (1933) (constitutional rights not lost at cession) and *Lucas v. Colorado*, 377 U.S. 713, 736 (1964) (constitutional voting rights of minority not waivable by majority), establish that neither the United States, nor any of its officers, could constitutionally interfere with that right of "persons" ceded to the United States or their political posterity.

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[2] In 1846, those portions of Virginia which had been ceded to the United States to form the District were retroceded to Virginia. *See infra* note 23.

(6) Nevertheless, ever since 1801, it has been assumed by some, but never authoritatively decided, that District inhabitants have no right to apportionment and to vote for voting representation in the House of Representatives.[3] On that assumption, the Secretary of Commerce intends to follow the practice of previous Secretaries and exclude inhabitants of the District of Columbia from his report to the President by which he performs his statutory duty to apportion the population of the several States and the membership of the House of Representatives, *see* 13 U.S.C. § 141(b), thereby obstructing voting representation of District inhabitants in the House.

(7) *Wesberry* teaches that in such circumstances it behooves the judiciary to test thoroughly any purported necessity for such a practice and the assumptions underlying it. *Wesberry*, 376 U.S. at 17-18. As the Supreme Court subsequently declared: "that an unconstitutional action has been taken before does not render the action any less unconstitutional at a later date." *See Powell v. McCormack*, 395 U.S. 486, 546-47 (1969). After thoroughly considering the various arguments, I have found nothing that necessitates federal officials continuing the practice of obstructing the "precious" constitutional right of the inhabitants of the District of Columbia to vote for voting representation in the House of Representatives. *See Wesberry*, 376 U.S. at 17-18.

(8) In addition, the Equal Protection Clause of the Fourteenth Amendment, incorporated into the Bill of Rights' Fifth Amendment and thereby made applicable to the national government,[4] requires a declaration that inhabitants of the

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[3] *See Heald v. District of Columbia*, 259 U.S. 114, 124 (1922) (dictum stating that "[r]esidents of the District lack the [right of] suffrage"); *see also Loughborough v. Blake*, 18 U.S. 317, 324 (1820) (dictum stating that inhabitants of the District are "a part of the society . . . which has voluntarily relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government . . . .") (Marshall, C.J.); infra Part II.B, II.C.2.c.vi; Maj. Op. at notes 29, 30, 32, 34 and accompanying text (summarizing statements of various Congressmen and commentators around time of adoption of Organic Act of 1801).

[4] *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217-18 (1995); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Bolling v. Sharpe*, 347 (continued...)

District of Columbia have and should henceforth enjoy the same right to apportioned representation in the House of Representatives as that enjoyed by residents of other federal enclaves,[5] former residents of States who live abroad,[6] as well as residents of States.

Accordingly, I would hold that both Article I and principles of equal protection require this Court to declare that qualified residents of the District have a constitutional right to vote for voting representation in the House of Representatives, and declare that 13 U.S.C. § 141(b), as construed and applied by the Secretary of Commerce, unconstitutionally obstructs their enjoyment of that right.

I

Although the facts have been well stated by my colleagues, some repetition and addition are necessary to bring the issues into focus for purposes of this dissent.

A

Article I of the original Constitution specifies that "Representatives . . . shall be apportioned among the several States" according to an "actual Enumeration" of persons made every ten years. U.S. Const. art. I, § 2, cl. 3. The Fourteenth Amendment has superceded in part, but not substantively altered, this requirement. *Id.* amend. XIV, § 2. Section 141(b) of Title 13 of the United States Code makes the Secretary of Commerce responsible for conducting the enumeration and providing the President with a "tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States." 13 U.S.C. § 141(b). The statute directs the President to transmit to the Congress "a statement showing the whole number of persons in each State . . . as ascertained under . . . each . . . decennial census, and the number of Representatives to which each State would be entitled." 2 U.S.C. § 2a(a). Finally,

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[4] (...continued)
U.S. 497, 500 (1954).

[5] *Evans v. Cornman*, 398 U.S. 419, 426 (1970).

[6] Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff.

the Clerk of the House is responsible for sending the "executive of each State a certificate of the number of Representatives to which each such State is entitled." 2 U.S.C. § 2a(b).

On December 26, 1990, a predecessor of the incumbent Secretary sent to President George Bush "a statement showing the apportionment population for each State as of April 1, 1990, tabulated from the 1990 Decennial Census." Statement of Undisputed Facts of Plaintiffs *Alexander et al.* with Supporting Declarations and Exhibits, Tab. 3. The statement included a determination of "the number of Representatives to which each State is entitled." *Id.* The statement allocated to every State at least one Representative. *Id.* The statement did not report the population of the District of Columbia,[7] include the District's population in the population of any State, or include its population in the total population used for apportionment purposes. *Id.* Nor did it allocate Representatives to the District. *Id.* The incumbent Secretary, a defendant here, intends to follow his predecessor's practice, as evidenced by his opposition to plaintiffs' motions. There being no allocation of Representatives, no transmittal by the President to the Clerk of the House, and no certificate by the Clerk to the District, the present practice of the Secretary obstructs inhabitants of the District from exercising their constitutional right to vote for voting representation in the House of Representatives. Meanwhile, the Secretary includes in his apportionment of persons and allocates representatives to residents of federal enclaves, and Congress permits voting, even where there may be no apportionment, by persons residing overseas who formerly resided in a State.

[7] According to the 1990 Decennial Census, the population of the District of Columbia as of April 1, 1990, was approximately 607,000. U.S. Census Bureau, The Official Statistics, Statistical Abstract of the United States (1998). As of 1990, there were three States with populations less than the District, each of which were each allocated one Representative: Alaska, population: 551,947; Vermont, population: 564,964; Wyoming, population: 455,975. *Alexander* Plaintiffs' Statement of Undisputed Facts, Tab 3. There were three States with populations under 700,000 which were also each allocated one Representative: Delaware, population: 668,696; North Dakota, population: 641,364; South Dakota, population: 699,999. *Id.*

B

Plaintiffs' claims present constitutional questions, the resolution of which requires examination of a broad sweep of political and legal history, including particularly the circumstances preceding and surrounding the adoption of the Seat of Government clause in the Constitution, the Maryland cession of territory and "persons" to the United States to form the District, the exercise by District residents of their right to vote for voting representation in Congress between 1790 and 1800, the evolution of the District of Columbia as a political entity from 1790 through the present, the favorable judicial and legislative treatment accorded similar claims by residents of federal enclaves (other than the District of Columbia) and to United States citizens residing outside the United States – all viewed in the light of the evolving applications of the post-Civil War Amendments and Acts of Congress in the latter half of the Twentieth Century with respect to voting rights.

1. The Seat of Government Clause

Before the adoption of the Constitution, there was no fixed national seat of government. Congress met in a number of locations.[8] In 1783, while Congress was meeting in Philadelphia, hundreds of angry Revolutionary War veterans surrounded the State House and demanded compensation for their services.[9] Neither the city of Philadelphia nor the State of Pennsylvania acted to protect Congress from the disturbances.[10] At the Constitutional Convention in 1787,[11]

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[8] From 1774 through the end of the Revolutionary War in 1783, Congress met in Philadelphia, Baltimore, and York, Pennsylvania. From 1783 through 1789, it met primarily in Philadelphia, but also in Princeton, New Jersey, Annapolis, Maryland, Trenton, New Jersey, and New York City. *See* Kenneth R. Bowling, The Creation of Washington, D.C. 15-19, 43-73 (1991); Walter Fairleigh Dodd, The Government of the District of Columbia 11-13 (1909); William Tindall, Origin and Government of the District of Columbia 13, 30-57 (1909).

[9] *See* Dodd, *supra* note 8, at 12-13; 2 Joseph Story, Commentaries on the Constitution § 1219 (Melville M. Bigelow, 5th ed. 1905); Bowling, *supra* note 8, at 29-34.

[10] *See* 2 Story, *supra* note 9, § 1219; Bowling, *supra* note 8, at 29-34; Dodd, *supra* note 8, at 13; Roy P. Franchino, *The Constitutionality of Home Rule and* (continued...)

mindful of this so-called Philadelphia Mutiny, the Framers sought to ensure that the national government would be free from interference by any State government and from dependence upon any State for protection.[12] As explained by James Iredell, at North Carolina's 1789 ratifying convention:

> What would be the consequence if the seat of government of the United States, with all the archives of America, was in the power of any one particular state? Would not this be most unsafe and humiliating? Do we not all remember that, in the year 1783, a band of soldiers went and insulted the Congress? The sovereignty of the United States was treated with indignity. They applied for protection to the state they resided in, but could obtain none. It is to be hoped such a disgraceful scene will never happen again; but that, for the future, the national government will be able to protect itself.

Elliot's Debates at 219-20, *reprinted in* 3 Philip B. Kurland & Ralph Lerner, The Founders' Constitution 225 (1987). Similarly, James Madison, in The Federalist, published while New York was deciding on ratification, defended "[t]he indispensable necessity of complete authority at the seat of government" on the grounds that

> [w]ithout it not only the public authority might be insulted and its proceedings interrupted with impunity, but a dependence of the members of the general government on the State . . . for protection in the

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[10] (...continued)

National Representation for the District of Columbia, 46 Georgetown L.J. 207, 209 (1957-58).

[11] On February 21, 1787, Congress had called for "a convention of delegates . . . appointed by the several states" to meet in Philadelphia to propose revisions to the 1781 Articles of Confederation. Documents Illustrative of the Formation of the Union of American States (Charles C. Tansill ed. 1927).

[12] 2 Story, *supra* note 9, § 1219; Dodd, *supra* note 8, at 19; Bowling, *supra* note 8, at 84. Some delegates also objected to the impermanency of the site of Congress' meetings. As Rufus King of Massachusetts stated, "[t]he mutability of the place had dishonored the federal [Government] and would require as strong a cure as we could devise." 3 Philip B. Kurland & Ralph Lerner, The Founders' Constitution 218 (1987); *see* Bowling, *supra* note 8, at 75-76; Dodd, *supra* note 8, at 19.

> exercise of their duty might bring on the national councils an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the Confederacy.

The Federalist, No. 43, at 272 (James Madison) (Clinton Rossiter ed. 1961).

These considerations, particularly the pre-Convention experience with the shifting location of the Continental Congress and exigencies such as the Philadelphia Mutiny which provoked Congress to move from time to time, prompted the inclusion of the Seat of Government clause in Article I of the Constitution.[13] The clause provides:

> The Congress shall have the Power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Arsenals, dock-Yards and other needful buildings;

U.S. Const. art. I, § 8, cl. 17. The Framers did not select a location for the Seat of Government, nor place any constraints on where that location should be, primarily to avoid offending either Philadelphia or New York, both of which might expect to be selected.[14] Instead, they left that potentially contentious decision to Congress.[15]

Neither the Seat of Government clause, nor any other provision of the Constitution, expressly mentions voting by, or representation of, inhabitants of the yet-to-be-selected Seat of

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[13] *See* 2 Story, *supra* note 9, § 1219; Franchino, *supra* note 10, at 209.

[14] Indeed, George Mason withdrew his proposal that would have prohibited the Seat of Government from occupying the same location as any State's seat of government, which he made because he thought that joint capitals would lead to jurisdictional disputes and lower the tone of the national legislature's deliberations, in the face of concerns that such prohibition "might make enemies of [Philadelphia and New York] which had expectations of becoming the Seat of the [General Government]." 3 Kurland & Lerner, *supra* note 12, at 218; Bowling, *supra* note 8, at 75; Dodd, *supra* note 8, at 19-20

[15] *See* Dodd, *supra* note 8, at 20.

Government. Indeed, the delegates to the Convention discussed and adopted the Seat of Government clause, and the remainder of the Constitution, without any recorded debate on its implications for the voting, representation or any other rights of the inhabitants of federal enclaves, including the yet-to-be-selected Seat of Government.[16]

2. Cession

Between 1788 and 1801, Maryland and Virginia ceded, and the United States accepted, the area which became the Seat of Government. It is undisputed that none of the pertinent documents contain a word about the voting rights of the persons to be ceded.

On December 23, 1788, Maryland offered Congress "any district in this state, not exceeding ten miles square, which the congress may fix upon and accept for the seat of government of the United States." An Act to Cede to Congress a District of Ten Miles Square in This State for the Seat of the Government of the United States, 1788 Md. Acts ch. 46, *reprinted in* 1 D.C. Code Ann. 33-34 (1991). On December 3, 1789, Virginia similarly offered "a tract of country not exceeding ten miles square, or any lesser quantity, to be located within the limits of the State . . . as Congress may by law direct, shall be, and the same is hereby forever ceded and relinquished to the Congress and Government of the United States." 13 Va. Stat. at Large, ch. 32, *reprinted in* 1 D.C. Code Ann. 32-33 (1991). Virginia's offer contained the proviso that "the jurisdiction of the laws of this commonwealth over the persons and property of individuals residing with the limits of the cession aforesaid, shall not cease or determine until Congress, having accepted the said cession, shall, by law, provide for the government thereof, under their jurisdiction." *Id.* Meanwhile, a number of other sites made strong bids for selection as the permanent

[16] *See* Bowling, *supra* note 8, at 75. The only references to voting by the inhabitants by the yet-to-be-selected Seat of Government occurred during the ratification process. These references, by James Madison, Alexander Hamilton and Thomas Tredwell, are discussed in detail *infra* § Part II.C.2.b.

Seat of Government.[17]

In July 1790, the first Congress of the United States, greatly influenced by President Washington, "accepted for the permanent seat of government of the United States" "a district of territory, not exceeding ten miles square," to be located within the territories offered by Maryland and Virginia. 1 Stat. 130, ch. 28, § 6. This Act also provided that Philadelphia would serve as the temporary seat of government until December 1, 1800, at which time the seat of government would transfer to its permanent location within the "district" accepted by the Act. *Id.* §§ 5, 6. By the terms of this Act, the laws of Virginia and Maryland continued to operate within the District of Columbia "until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide." *Id.* § 1 (emphasis added).

The boundaries of the permanent seat of government were fixed by Presidential proclamation of March 30, 1791. *See Morris v. United States*, 174 U.S. 196, 200 (1899). Later that year, commissioners appointed by President Washington chose the names "Washington" for the federal city and "Columbia" for the federal district.[18] There was no District of Columbia political entity created at that time, although the municipal corporations of Alexandria and Georgetown continued to exist.

On December 19, 1791, Maryland passed an act ratifying the cession. It provided that the portion of the Seat of Government "which lies within the limits of this State shall be . . . forever ceded and relinquished to the Congress and the Government of the United States, and full and absolute right and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon," while retaining jurisdiction over "persons and property of individuals residing within the limits" of the territory it ceded until Congress assumed jurisdiction. An Act Concerning the Territory of Columbia and the City of Washington, 1791 Md. Acts ch. 45, § 2, *reprinted in* 1 D.C. Code Ann. 34, 35 (1991) (emphasis added).

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[17] *See* Bowling, *supra* note 8, at 129.

[18] *See* Tindall, *supra* note 8, at 94.

On the first Monday in December 1800, as provided by the 1790 Act, the District became the permanent Seat of Government of the United States. 1 Stat. 130, ch. 28, § 6. On February 27, 1801, Congress enacted the "Organic Act of 1801," thereby assuming exclusive jurisdiction over the District. 2 Stat. 103, ch. 15. That Act divided the District into two counties — Washington and Alexandria; it also, *inter alia*, provided that the laws of the Maryland and Virginia would continue to apply to the respective parts of the District of Columbia which had been ceded by each state; established a federal court for the District of Columbia; established a marshal for the District; and provided that an attorney for the United States should be appointed for the District. *Id.* In 1800, the population of the ten-mile square area constituting the original Seat of Government totaled approximately 8,000, of whom approximately 6,000 were white, and approximately 2,000 were black.[19]

3. Voting in the District Between 1790 and 1800

There is undisputed historical evidence, and I would find, that from 1790 through 1800, qualified residents in what was proclaimed in 1791 to be the District continued to vote in the elections of federal officers conducted in Maryland and Virginia, including for Representatives in Congress, even though Maryland and Virginia had ceded the land to the federal government and the boundaries of the District had been drawn.[20]

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[19] U.S. Department of Commerce, Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1970, Bicentennial Edition, Part 2, at 26 (1975).

[20] *See* Memorandum Amici Curiae at 17 (filed Feb. 26, 1999); Tindall, *supra* note 8, at 17; Peter Raven-Hansen, Congressional Representation for the District of Columbia: A Constitutional Analysis, 12 Harv. J. on Legis. 167, 174 (1975). In addition, there is direct evidence that residents of the District between 1790 and 1800 were eligible to vote for Congressional representatives through the ceding state. For example, Thomas Beall, a resident of Georgetown during those years, an area encompassed by the newly-drawn District boundaries, was a representative in the Maryland House of Delegates in 1800. Archive of Maryland, new series I, An Historical List of Public Officials of Maryland, Vol. 1, at 229 (Maryland State Archives, 1990). The Maryland Constitution then in effect required that (continued...)

Following Congress' enactment of the Organic Act in 1801, and the assumption of exclusive jurisdiction by the United States, Maryland and Virginia no longer permitted inhabitants of the District to vote in their local, state and federal elections.[21] At that time, there was no District government or voting apparatus, and Congress made no provision for voting by inhabitants of the District. It was generally assumed that inhabitants of the District would no longer enjoy the right to vote for voting representation in the House of Representatives.[22] And, in fact, since then no inhabitant of the portion of the District ceded by Maryland has voted for voting representation in the House of Representatives.[23]

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[20] (...continued)
representatives to its house of delegates be eligible to vote in the county which they represented. Maryland Constitution (1776). The United States Constitution provides that those persons eligible to vote for representatives to the "most numerous branch of the State Legislature" are also eligible to vote for the House of Representatives. U.S. Const. art. I, § 2. Accordingly, Thomas Beall, a resident of the District, was eligible to vote in Maryland's state and federal elections in 1800 (and almost surely voted for himself!). A Biographical Dictionary of the Maryland Legislature, 1635-1789, Vol. 1: A-H, at 124 (Edward C. Papenfuse, Alan F. Day, David W. Jordan, Gregory A. Stiverson eds.).

[21] Tindall, *supra* note 8, at 17; Raven-Hansen, *supra* note 20, at 174-76.

[22] *See* Maj. Op. at notes 29, 30, 32, 34 and accompanying text.

[23] On July 9, 1846, Congress authorized the retrocession to Virginia of the County of Alexandria, contingent on the assent of its residents. An Act to Retrocede the County of Alexandria, in the District of Columbia, to the State of Virginia, 9 Stat. 35 (1846). In a submission to Congress, a "committee appointed by the common council of Alexandria" described some of the motives for seeking retrocession:

> We are deprived of the elective franchise, a privilege so dear and sacred that we would present its deprivation in the strongest light before your honorable body. Side by side with trial by jury and the writ of habeas corpus may be placed the rights of the ballot box. It is not unworthy to remark that while the principles of free government are yearly extending with the rapid march of civilization, and thrones and dynasties are yielding to their influence, here alone in the 10 miles square in and about the capital of this great country is there no improvement, no advance in popular rights.

Tindall, *supra* note 8, at 110. The committee also mentioned the failure of Congress to regularly update the laws of Virginia, which, absent congressional revision, had remained in effect throughout Alexandria County in their 1801 form. *Id.* at 109-110. After the retrocession took effect, the District of Columbia consisted entirely of only the territory ceded by Maryland.

4. Evolution of a District of Columbia Voting Apparatus

In 1802, the District included five jurisdictions: the counties of Alexandria and Washington, the towns of Alexandria and Georgetown, and the City of Washington.[24] For the period from 1800 through 1871, however, there was no elected government for the District of Columbia as a whole.[25]

In 1871, Congress first authorized a comprehensive local government for the District, consisting of a governor appointed by the President, and a unicameral 22-member house of delegates elected by the male citizens of the District. An Act to Provide a Government for the District of Columbia, 16 Stat. 419, ch. 62 (1871). That form of representative local government was short-lived; Congress abolished it in 1874. An Act for the Government of the District of Columbia, and for Other Purposes, 18 Stat. 116, ch. 337 (1874). From 1874 until 1967, three unelected Commissioners, appointed by the President, governed the District. *Id.*; An Act Providing a Permanent Form of Government for the District of Columbia, 20 Stat. 102, ch. 180 (1878).[26] In 1967, Congress replaced the Board of Commissioners with an appointed 9-member Council and an appointed Commissioner. Reoganization Plan No. 3 of 1967, 32 F.R. 11669.

It was not until the early 1960's that the voting landscape in the District began to change. On March 29, 1961, the Twenty-third Amendment was ratified. It gave residents of the District of Columbia the right to appoint electors for the election of the

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[24] *See* Dodd, *supra* note 8, at 30.

[25] As distinguished from the municipalities of Washington, Georgetown and (from 1790 to 1846) Alexandria. Congress incorporated the City of Washington in 1802, providing for a council elected annually "by the free white male inhabitants of full age, who have resided twelve months in the city, and paid taxes therein the year preceding the election's being held." An Act to Incorporate the Inhabitants of the City of Washington, in the District of Columbia, 2 Stat. 195, ch. 53, § 2 (1802). The County of Washington was governed by a "levy court" the members of which were appointed by the President. *See* Dodd, *supra* note 8, at 27-38. In 1805, Congress provided Georgetown with a council elected along the lines of the City of Washington's. *Id.*

[26] *See also* Tindall, *supra* note 8, at 141; *see generally* Franchino, *supra* note 10, at 214-223.

President and Vice President of the United States.[27] In 1970, Congress authorized residents of the District to elect a non-voting delegate to the House of Representatives. *See* 2 U.S.C. § 25a. As a corollary, in the wake of the Twenty-third Amendment and the 1970 provision for election of a non-voting delegate to the House, the District became equipped with a rudimentary voting system.

In 1973, Congress further relaxed its "exclusive legislation" power over the District by passage of the Home Rule Act of 1973.[28] *See* District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973). By that Act, Congress granted District citizens the right to elect a Council authorized to enact local legislation, subject to Congress' ultimate authority, provided the District with an elected Mayor, and further perfected the election apparatus earlier created to administer presidential and non-voting delegate elections. *Id.* Congress created the District government "to relieve Congress of the burden of legislating essentially local District matters." *Id.* A few years earlier, the Court Reorganization Act of 1970 had created state-like courts of general jurisdiction whose appellate decisions are appealable directly to the Supreme Court by the same process that state court decisions are appealable.[29] In 1995, Congress established the Control Board, consisting of five members

[27] The Twenty-Third Amendment provides:

> Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as Congress may direct:
>
> A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

U.S. Const. amend. XXIII.

[28] Over the years, Congress has similarly relaxed its exclusive jurisdiction in enclaves. *See infra* Part III.

[29] The judges of these courts are appointed by the President, and they displace the general jurisdiction formerly exercised by the federal District Court and Court of Appeals for the District of Columbia.

appointed by the President, to "eliminate budget deficits and management inefficiencies in the government of the District of Columbia." Pub. L. No. 104-8, 109 Stat. 97 (1995).

Meanwhile, the population of the District, which in 1800 had been less than one fifth of the smallest state, Delaware,[30] and less than a quarter of that contemplated by the Northwest Ordinance of 1787 for the admission of a new state,[31] had burgeoned by 1990 to over 600,000 — a number more than equal to the population of several states, *see supra* note 7.

5. Evolution of Voting Rights Nationally

Paralleling the evolution of the District of Columbia and a voting apparatus therein, was the evolution of voting rights nationally, "a continuing expansion of the scope of the right of suffrage in this country." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Voting nationally has evolved from 18th century suffrage limited to white, property-owning, tax-paying males, over the age of 21, to the virtual universal suffrage today enjoyed by all but minors, felons, and the people of the District of Columbia. *See also* Alexander Plaintiffs Memorandum in Support of Motion for Summary Judgment, Appendix A.

II
ARTICLE I

The foregoing facts bring the following legal considerations into focus. In *Wesberry*, the Supreme Court considered whether state laws creating congressional voting districts with widely disproportionate populations violated the voting rights of inhabitants of less populous districts guaranteed to them by Article I, section 2 of the Constitution. The Court concluded that the Constitution requires that districts be apportioned so

[30] Delaware's population in 1800 was approximately 64,000; the District's was approximately 8,000. U.S. Department of Commerce, Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1970, Bicentennial Edition, Part 2, at 25 (1975).

[31] The Northwest Ordinance of 1787, ratified by the First Congress in 1789, provided that new states created from the lands of the Northwest Territories needed a minimum population of 50,000 before they could be admitted to the Union. *See* 1 Stat. 50-52.

as to satisfy as nearly as possible the maxim "one person, one vote." *Wesberry*, 376 U.S. at 18. The plain statement in *Wesberry*, bears repeating:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges that right.

Wesberry, 376 U.S. at 17-18 (emphasis added). For people in the District of Columbia, Congress is the ultimate "exclusive" legislature. The Secretary's continued failure to include the people of the District of Columbia in apportionment contributes to their heretofore permanent disenfranchisement in their ultimate legislature – Congress – because the place where they live, once part of the State of Maryland, is not now literally a State. Those who would interfere with the exercise of the "precious" right to vote have a heavy burden of persuasion and proof that their interference is "necessary." To put it simply, the defendants have failed to persuade me that it is necessary for the Secretary to exclude the people of the District from apportionment and thus interfere with their voting for a Member of the House of Representatives.

A

It would seem to be axiomatic that interference with a person's "precious" right to vote for a Member of Congress, such as that exercised by District inhabitants before 1801, and protected from dilution by the *Wesberry* doctrine, violates a constitutional right. In any event, the Supreme Court long ago determined, and has often reiterated, that such a right has a firm foundation in the Constitution.

In a series of cases, beginning with *Ex parte Yarbrough* (*The Ku-Klux Cases*), 110 U.S. 651 (1884), the Supreme Court has held that the Constitution is the source of, and guarantees protection for, the right to vote for Members of the House of Representatives. In *Yarbrough*, the Court validated a statute

making it a federal crime to interdict voting by force or intimidation because "the exercise of the right [to vote] [for minorities and for other citizens] is guaranteed by the constitution, and should be kept free and pure by congressional enactments whenever that is necessary." *Id.* at 665 (emphasis added). *Yarbrough* clarified the Court's earlier decision in *Minor v. Happersett*, 88 U.S. 162 (1874). In *Minor*, the Court held that the Fourteenth Amendment's privileges and immunities clause did not confer upon females a right to vote, stating that "the Constitution of the United States does not confer the right of suffrage upon any one." *Id.* at 178. The *Yarbrough* Court explained that this statement did not mean that the Constitution conferred the right to vote upon "no one," but only that it did not confer it upon anyone who happened to claim such a right. *Yarbrough*, 110 U.S. at 664. Females were not a class upon whom the Constitution conferred the right to vote because, as the *Minor* court recognized, at the time of its adoption most states did not permit females to vote and because the very text of the Fourteenth Amendment suggested, in another context, that it contemplated only male voters.[32] *Minor*, 88 U.S. at 172-74. Of particular significance for the political posterity of the pre-1801 voters, the *Minor* court cautioned that "[t]he right of suffrage, when granted, will be protected. He who has it can only be deprived of it by due process of law, but in order to claim the protection, he must first show that he has the right." *Minor*, 88 U.S. at 176.

Since *Yarbrough*, the Supreme Court has never wavered from its conclusion there that voting in federal elections is a

[32] Section 2 of the Fourteenth Amendment provides (emphasis added):

> But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis for representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. Const. amend. XIV.

constitutionally-protected right. For example, in 1941, the Court held that qualified voters have a right to participate in congressional primary elections, stating that the right to vote in congressional elections "whatever its appropriate constitutional limitations, . . . is a right established and guaranteed by the Constitution." *United States v. Classic*, 313 U.S. 299, 314, 320 (1941). In 1964, the Court started its analysis of the constitutionality of the apportionment of seats in a State legislature from the premise that "[u]ndeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections." *Reynolds*, 377 U.S. at 554; *see also Wesberry*, 376 U.S. at 17. A few years later, the Court reiterated that "the right to vote in federal elections is conferred by Art. I, § 2, of the Constitution." *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 665 (1966). More recently, the Supreme Court, in concluding that States may not add to the qualifications for members of Congress that are enumerated in Article I, §§ 2 and 3, observed that "[e]lecting representatives to the National Legislature was a new right, arising from the Constitution itself." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995); *see also Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'") (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). Accordingly, I would conclude that the inhabitants of the District who voted for representation in the House of Representatives before 1801 were exercising a right to vote created and protected by the Constitution.

B

It is undisputed that the inhabitants of the District ceased to vote for a Member of the House of Representatives after the enactment of the Organic Act in 1801. Yet, neither the Organic Act nor any of the other statutes or instruments effecting cession purported, by their terms, to extinguish that right. The question remains whether that Act, or the cession transaction as a whole, nonetheless necessarily and otherwise lawfully

terminated the pre-1801 voting rights of those persons ceded.

The defendants rely heavily upon Chief Justice Marshall's statement in *Loughborough v. Blake*, 18 U.S. 317, 324 (1820), that the inhabitants of the District were "a part of the society . . . which has voluntarily relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government." However, any reliance on *Loughborough* as controlling precedent is misplaced. The specific issue before the *Loughborough* Court was whether Congress had the power to impose a direct tax on residents of the District of Columbia, *id.* at 318, even though the tax apportionment clause then in effect, like the voting apportionment clause, refers by its terms only to "States," U.S. Const. art. I, § 2. The Court held that Congress' "power to lay and collect taxes," *id.* art. I, § 8, included such a power, particularly where it had the power of "exclusive legislation," and that the directive in Article I, section 2, that "taxes shall be apportioned among the several states" did not restrict those powers, *Loughborough*, 18 U.S. at 322-25. The statement that District inhabitants "voluntarily relinquished the right to representation," made in response to the argument that taxing the District violated the principle that there should be no taxation without representation, is, at best, dictum. The statement does not authoritatively establish that the District or its people waived any claim to a right to voting representation in Congress. As Chief Justice Marshall said about dicta in a related context the very next year:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing

on all other cases is seldom completely investigated. *Cohens v. Virginia*, 19 U.S. 264, 399 (1821).

Even if the *Loughborough* dictum were an authoritative conclusion of law (which it was not), it would confirm by necessary inference the pre-1801 voting rights of the people ceded to the District; if they had no such pre-1801 rights they would have had nothing to "relinquish[]." *Loughborough*, 18 U.S. at 324. More important, the Supreme Court has since held that "[a]n individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate." *Lucas*, 377 U.S. at 736. Although *Lucas* was a Fourteenth Amendment case, the principle it announced does not derive from the Fourteenth Amendment. Rather, the principle that voting rights are not defeasible by majority vote is intrinsic to the concept of a constitutional right. *Cf. College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2229 (1999) ("[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights.") (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)). Under the *Lucas* principle, *a fortiori*, even if Maryland's cession and the United States' acceptance ended the access of inhabitants of the ceded portion of that State to the Maryland voting apparatus, the cession could not eliminate the ongoing (albeit inchoate or dormant) constitutional right to voting representation of the District inhabitants ceded there from Maryland and their political posterity.

That pre-cession constitutional rights, absent any lawful waiver, survived the cession is confirmed by Supreme Court opinions in related contexts. In 1901, the Supreme Court addressed the question of whether the provision in Article I, section 8, of the Constitution that states that "all duties, imposts and excises shall be uniform throughout the United States" barred Congress from imposing duties on products coming from the territory of Puerto Rico into the state of New York. *Downes v. Bidwell*, 182 U.S. 244 (1901). In analyzing this question, Justice Brown, announcing the judgment of the Court, revisited the Supreme Court's decision in

Loughborough, where the Court had held that Congress could impose a direct tax on the people of the District even though the Article I, section 2 stated that "direct Taxes shall be apportioned among the several States." *Loughborough*, 18 U.S. at 322-325. Justice Brown explained the decision in *Loughborough* as follows:

> This District had been a part of the states of Maryland and Virginia. It had been subject to the Constitution, and was a part of the United States. The Constitution had attached to it irrevocably. There are steps which can never be taken backward. The tie that bound the states of Maryland and Virginia to the Constitution could not be dissolved, without at least the consent of the Federal and state governments to a formal separation. The mere cession of the District of Columbia to the Federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution. Neither party had ever consented to that construction of the cession. If, before the District was set off, Congress had passed an unconstitutional act affecting its inhabitants, it would have been void. If done after the District was created, it would have been equally void; in other words, Congress could not do indirectly, by carving out the District, what it could not do directly. The District still remained a part of the United States, protected by the Constitution. Indeed, it would have been a fanciful construction to hold that territory which had been once a part of the United States ceased to be such by being ceded directly to the Federal government.

Downes, 182 U.S. at 260-61 (Brown, J.) (emphasis added).

In 1933, applying the theory espoused in *Downes*, the Supreme Court addressed the question of whether the federal judges in the District were entitled to Article III protection against reduction of their compensation. *O'Donoghue*, 289 U.S. 516. The *O'Donoghue* Court concluded that the inhabitants of the District of Columbia possess "the right to have their cases arising under the Constitution heard and

determined" by a genuine Article III court. *Id.* at 540. The Court explained its decision as follows:

> It is important to bear constantly in mind that the District was made up of portions of two of the original states of the Union, and was not taken out of the Union by the cession. Prior thereto its inhabitants were entitled to all the rights guaranties, and immunities of the Constitution, among which was the right to have their cases arising under the Constitution heard and determined by federal courts created under, and vested with the judicial power conferred by, article 3. We think it is not reasonable to assume that the cession stripped them of these rights, and that it was intended that at the very seat of the national government the people should be less fortified by the guaranty of an independent judiciary than in other parts of the Union.

Id.

From the foregoing, it is apparent that the cession transaction could not lawfully terminate or effectively waive the right of "persons" ceded, particularly the 1790-1800 voters, to voting representation in the House of Representatives. Nor could the cession preclude voting representation of the "persons to be" in the ceded area. The Constitution is no mere contract, subject to some kind of rule against perpetuities, between particular individuals and the national government. On the contrary, it is a covenant in perpetuity which makes the United States a fiduciary responsible for protecting for all time the rights created in and by the people who originated the Constitution for the benefit of themselves and their "Posterity." Constitution (Preamble). The people of the District of Columbia today are the political "posterity" of the People in the District who had, and exercised, a constitutional right to vote in congressional elections from 1790 through 1800. Under established constitutional principles, neither the then-People of the District nor their Posterity forfeited that constitutional right when the District became the Seat of Government, and neither Maryland, nor the United States or its officers, had the constitutional

authority to forfeit that right for them.

From another perspective, it is noteworthy that since 1820 when the *Loughborough* Court made its observation about voting by people in the District of Columbia, the voting landscape nationwide and in the District has changed dramatically, as has the District and its demographics. There is no evidence that the *Loughborough* court contemplated the time when that territory would be a body politic which was home for upwards of 500,000 people, equal to the population of at least three of the States. It is served by an elected executive authority in the form of a mayor, an elected council which is the functional equivalent of a unicameral legislature, as well as a well-tested election apparatus for voting for council members, a non-voting delegate in Congress and presidential Electors. In considering the current weight to be accorded the *Loughborough* dictum, it is to be recalled that it was also Chief Justice Marshall who wrote:

> . . . [W]e must never forget that it's a constitution we are expounding.
>
> . . .
>
> [It was] intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.

McCulloch v. Maryland, 17 U.S. 316, 407, 415 (1819) (Marshall, C.J.); *see also* Byron R. White, *Tribute to Honorable William J. Brennan, Jr.*, 100 Yale L.J. 1113, 1116 (1991) (Constitution is a document cast in "majestic, open-ended clauses").

C

Given that the people living in the District from 1790-1800 had and exercised a constitutionally-protected right to vote for Congressional representation, and that that right was not, and could not have been, lost or waived in 1801 when the federal government assumed exclusive jurisdiction over the District, the question remains whether, under *Wesberry*, anything else necessitates defendants' continuing to deny or interfere with the right of their political posterity to vote for voting representation in the House of Representatives. Looking at

the literal text of Article I and any necessary inferences therefrom, the 23rd amendment, nonvoting by citizens in the territories, and the lapse of time since the inhabitants of the District last voted in 1800, my answer is "nothing else."

1. Plain Language

The plain language of the Constitution does not necessitate denying the people of the District the right to voting representation in Congress. Neither the Seat of Government clause nor any other provision of Article I addresses, much less directly precludes, congressional representation for the people of the District. If the Framers intended to deny voting representation in Congress to the inhabitants of the Seat of Government, the Seat of Government clause was an appropriate place to say so. It does not.

The Framers and the drafters of the Bill of Rights knew how to say "no" directly. The original constitution said "no" twenty-seven times. *See, e.g.*, U.S. Const. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not . . . .) (emphasis added); *see also id.* art. I, § 3, cl. 3 ("No Person shall be a Senator who shall not . . . .") (emphasis added); *id.* art. II, § 1, cl. 5 ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . . .) (emphasis added).[33] Nowhere does the Seat of Government

[33] Sections 9 and 10 of Article I are a catalogue of express prohibitions. *See, e.g.*, U.S. Const. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended . . . .") (emphasis added); *id.* art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.") (emphasis added); *id.* art. I., § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation . . . .") (emphasis added). Article III provides that "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." *Id.* art. III, § 3, cl. 1 (emphasis added). Article IV specifies that "no new State shall be formed or erected within the Jurisdiction of any other State; nor any State formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress." *Id.* art. IV, § 3, cl. 1 (emphasis added). The Bill of Rights also says "no" repeatedly. *See, e.g., Id.* amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .") (emphasis added); *id.* amend. III ("No Soldier shall, in time of peace be (continued...)

clause or any other provision of the Constitution expressly prohibit people in the District from voting for, and enjoying the service of, voting representatives in Congress.

2. Inferences from the use of the word "State"

The use of the word "State" in the various provisions of Article I concerning the election of members of the House of Representatives does not necessitate denying the people of the District the right to voting representation in Congress. The defendants maintain, in effect, that the use of the word "State" in these provisions creates a necessary inference that people not in a "State," therefore, people in the District of Columbia, cannot choose or be a Representative.[34] In essence, the defendants would apply the maxim *expressio unius est exclusio alterius* – the expression of one thing is the exclusion of another – as the basis for interpreting the term "State." The *expressio unius* maxim is "[a] non-binding rule of statutory interpretation, not a binding rule of law." *Martini v. Federal Nat'l Mortgage Ass'n*, 178 F.3d 1336, 1342 (D.C. Cir. 1999). As the Court of Appeals for the District of Columbia Circuit recently explained, in rejecting the application of the maxim to construe a statute,

> "[t]he maxim's force in particular situations" . . . "depends entirely on context, whether or not the draftsmen's mention of one thing . . . does really necessarily, or at least reasonably, imply the preclusion of alternatives." . . . That in turn depends on "whether,

[33] (...continued)
quartered in any house, without the consent of the Owner . . . .") (emphasis added).

[34] The defendants rely on the following language in Article I: (1) that members of the House of Representatives are chosen by "the People of the several States"; (2) that the "Electors in each State shall have the Qualifications requisite for Electors in the most numerous Branch of the State Legislature"; (3) that Representatives are to be "apportioned among the several States"; (4) that a Representative must "be an Inhabitant of that State in which he shall be chosen"; and (5) that the "Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, §§ 2, 4; Memorandum on Behalf of Secretary Daley and the United States in Opposition to Plaintiffs' Motion for Summary Judgment and in Support [of] Their Motion To Dismiss Plaintiffs' Claims at 8-10 (filed Dec. 18, 1998) ("Sec'y Opp.").

> looking at the structure of the statute and perhaps its legislative history, one can be confident that a normal draftsman when he expressed 'the one thing' would have likely considered the alternatives that are arguably precluded."

Id. at 1343 (quoting *Shook v. District of Columbia Financial Responsibility and Management Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998)); *see also In re Sealed Case*, 181 F.3d 128, 132, (D.C. Cir. 1999) (en banc) ("The legal maxim expressio unius est exclusio alterius . . . is not always correct."). As the Supreme Court has explained, "The 'exclusio' is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice." *Ford v. United States*, 273 U.S. 593, 612 (1927) (internal quotations omitted); *see also* Einer Elhauge, *Are Term Limits Undemocratic?*, 64 U. Chi. L. Rev. 83, 91 (1997) ("The underlying difficulty is that the failure to list other things may reflect simple inadvertence, a failure to consider those other things, or an inability to reach a consensus . . . .").

The Supreme Court's decisions reflect its recognition of the limited utility of the maxim; it generally chooses to justify an interpretation that would be consistent with the maxim on other or additional grounds.[35] For example, in *Powell*, 395 U.S.

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[35] In this analysis of the role of the *exclusio unius* maxim to the circumstances of this case, I do not overlook the several occasions in which the Supreme Court, and the Framers themselves invoked or discussed the maxim. For example, Alexander Hamilton argued that the enumeration of certain cases over which the federal courts have jurisdiction, *see* U.S. Const. art. III, § 2, cl. 1, "marks the precise limits beyond which the federal courts cannot extend their jurisdiction," because "the specification would be nugatory if it did not exclude all ideas of more extensive authority." The Federalist No. 83, at 497 (Alexander Hamilton). He explained that "an affirmative grant of special powers would be absurd, as well as useless, if a general authority were intended." *Id.* In *Marbury v. Madison*, Chief Justice Marshall echoed Hamilton's reasoning in concluding that Congress could not augment the original jurisdiction of the Supreme Court as described in Article III, § 2, clause 2. 5 U.S. 137, 174 (1803).

The Supreme Court has also treated the Constitution's enumeration of particular exceptions as barring the recognition of other exceptions. In *INS v. Chadha*, in (continued...)

486, the House of Representatives adopted a resolution excluding Adam Clayton Powell, Jr. from membership because it found that he had wrongfully diverted House funds and made false reports on expenditures of foreign currency. These facts framed an issue of whether Congress had the power to exclude an individual elected to the House of Representatives for any reason other than those set forth in the text of the Qualifications Clause of the Constitution.[36] The Court concluded that "the Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote" because the qualifications for office expressed in the Constitution were intended to be exclusive, *i.e.*, no additional qualifications could be imposed by Congress. *Id.* at 548. Although such an interpretation is consistent with the application of the *expressio unius* maxim, the Court did not mention it. Instead, the Court pointed to the Framers' concern that a future Congress might fall into the error committed by Parliament in its 18th century harassment of its non-conformist member, John Wilkes. *Id.* at 527-31. With Wilkes' experience in mind, the *Powell* Court did not rest its interpretation of the Qualifications Clause on any maxim. Instead, it relied heavily upon the "relevant historical

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[35] (...continued)
considering the constitutionality of the legislative veto, the Court identified four "carefully delineated exceptions from presentment and bicameralism," which generally served as prerequisites for the exercise of legislative authority. 462 U.S. 919, 956 (1983). The Court concluded that the legislative veto was unconstitutional in part because the veto "was not within any of the express constitutional exceptions authorizing one House to act alone." *Id.*

None of the foregoing applications of negative inference necessitates the use of negative inference to read Article I as denying congressional representation to the people of the District. The provisions of Article I at issue here do not fall into the category of affirmative grants of specific powers such as were discussed by Hamilton in The Federalist No. 83 or at issue in *Marbury*, nor do they involve enumerated exceptions, as in *Chada*. Moreover, unlike the provisions construed in *Marbury* and *Chada*, the defendants' proposed interpretation of Article I is not necessary to avoid an "absurd" or "nugatory" meaning.

[36] With respect to the House of Representatives, the Constitution provides: "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." U.S. Const. art. I, § 2, cl. 2.

materials" and "the basic principles of our democratic system." *Id.* at 522, 548.

Similarly, in *Term Limits*, 514 U.S. 779, the Supreme Court concluded that the Qualifications Clause barred States from imposing term limits on members of Congress. Again, although its interpretation of the clause was consistent with the application of the *expressio unius* maxim,[37] the Court based its conclusion on "the text and structure of the Constitution, the relevant historical materials, and, most importantly, the 'basic principles of our democratic system.'" *Id.* at 806 (quoting *Powell*, 395 U.S. at 548).

In light of the interpretive principles articulated and applied by *Powell* and *Term Limits*, I believe that the issue before this Court should not be resolved simply by rote application of the *expressio unius* maxim. The question remains whether other considerations justify the negative inference from the use of the term "States" proposed by the defendants. An examination of the structure and purpose of Article I, the relevant historical materials, parallel constitutional provisions, and the basic principles of our democratic system, leads me to the conclusion that none do.

a. *Structure and Purpose of Article I*

There is nothing in the use of the word "States" in the provisions of Article I pertaining to the election of members of the House of Representatives that expressly precludes

[37] In reaching this conclusion, I do not overlook footnote 9 in the *Term Limits* majority opinion which acknowledges that the same result could be reached through application of the maxim. However, the majority was merely responding to the dissent's argument that the application of the maxim had no place in the analysis, rejecting the argument that "it had no merit." The majority's decision, however, clearly was not controlled by the maxim, as shown by the fact that its only mention appears in a footnote. Even Justice Story, whom the *Term Limits* court cites as supporting the application of the maxim in the interpretation of the Qualifications Clause, cautioned that this maxim was "susceptible of being applied, and indeed [is] often ingeniously applied, to the subversion of the text and the objects of the instrument." 1 Joseph Story, Commentaries on the Constitution § 448, at 342 (Melville M. Bigelow, 5th ed. 1905). In his view, therefore, "[t]he truth is, that, in order to ascertain how far an affirmative or negative provision excludes or implies others, we must look to the nature of the provision, the subject-matter, the objects, and the scope of the instrument." *Id.* at 343.

recognition of a right for the inhabitants of the District to vote for voting representation in Congress. More importantly, no policy purpose would be served by adopting such an interpretation. The primary purpose of the references to "States" in Article I is apparent when one considers that it was a priority of the Framers to set up a mechanism to create a national form of representative government. As Justice Kennedy observed in his concurring opinion in *Term Limits*: "the Constitution takes care both to preserve the States and to make use of their identities and structures at various points in organizing the federal union." *Id.* at 840 (Kennedy, J., concurring) (emphasis added). In 1787, the 13 original States were the obvious and, actually, only political subdivisions capable together of conducting national elections. Chief Justice Marshall made the point in respect to the discrete role of States and the people in the process employed to ratify the original Constitution:

> It is true, [the people] assembled in their several states – and where else should they have assembled? . . . [W]hen they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.

McCulloch, 17 U.S. at 403 (emphasis added). It does not denigrate the "sovereignty" of States and their other roles, internally and vis-a-vis the national government, to recognize the very significant use of their "identities and structures" in the national election process. *Term Limits*, 514 U.S. at 840. Nor does such use of them in that process necessarily impute to the Framers an intention to confer on the States anything other than an essentially ministerial role in that process. Nor does it necessarily imply an intention to exclude the people of the District from that process.

As the *Term Limits* Court further explained, "the Framers envisioned a uniform national system, rejecting the notion that the Nation was a collection of States, and instead creating a direct link between the National Government and the people of the United States." *Term Limits*, 514 U.S. at 803.

With this goal in mind, the majority of the references to "States" in Article I can best be understood as specifying and using the most practical mechanisms available in the 18th century by which the people scattered among the several States could select their national representatives. *See also* The Federalist No. 61, at 372 (Alexander Hamilton) (referring to Article I as "the provisions respecting elections"). So understood, their employment in the circumstances that obtained in the late 18th century should not preclude employment by the people of the District of the election apparatus only available to them since the 1960's through which to regain representation in the House of Representatives enjoyed by their political forebears until 1801.

The requirement that a Representative be an inhabitant of the State which he or she represents, *see* U.S. Const. art. I, § 2, is the only reference to States in the context of choosing Representatives that is not related to using the States as a mechanism for selecting Representatives. It seems obvious, however, that the primary, if not sole, purpose of that requirement was to see to it that Representatives live among the people represented. It should be obvious that this requirement was not aimed at denying the right of the people of the District to vote for voting representation in the House of Representatives. At most, it means that if the inhabitants of the District enjoyed representation by a member from the District, their Representative should reside there.

The Supreme Court's decisions in *Powell* and *Term Limits* do not undermine, indeed they tend to confirm, these interpretations. In both *Powell* and *Term Limits*, the Court was concerned with the question of whether additional qualifications beyond those expressly stated in the Qualifications Clauses of the Constitution could be imposed on a potential member of Congress. In both cases, the Court held that they could not, relying in large part on its understanding that the Framers' intent in adopting those clauses was to ensure that the opportunity to serve as a Member of the House of Representatives should be open to as many as possible. *Term Limits*, 514 U.S. at 794-95, 819;

Powell, 395 U.S. at 547. The precise question here is not whether to impose additional qualifications, but rather how to interpret the meaning and scope of one of those qualifications. In an important sense, including the people of the District (whose political forebears were people of one of the several States) and representation for them in the House of Representatives in the apportionment process will serve a constitutional purpose honored by the *Powell* and *Term Limits* courts that "election to the National Legislature should be open to all people of merit." *Term Limits*, 514 U.S. at 819; *see also Powell*, 395 U.S. at 547.

b. *Historical Materials*

The relevant historical materials do not necessitate a conclusion that the Framers intended to deny to the inhabitants of the yet-to-be-selected Seat of Government the right to vote for voting representation in Congress through the use of the term "States" in Article I. On the contrary, the Framers had a clear purpose in creating a national Seat of Government subject to "exclusive legislation" by Congress and fully independent of any State, *see supra* Part I.B.1, a purpose not furthered by denying its inhabitants the right to vote for voting representation in the House of Representatives. Indeed, the only recorded discussions of, or references to, voting by the inhabitants of the District appear to have occurred after the Constitutional Convention, either during the ratification debates, at the time of the passage of the Organic Act in 1801, or in later Supreme Court opinions.

(i) Seat of Government Clause

It is undisputed that the Framers' primary, if not only, policy purpose with respect to the Seat of Government clause, was to create a specific Seat of Government, instead of a roving one, subject to the exclusive legislative power of Congress, and free from dependence upon, and the interference from, any State. *See supra* Part I.B.1. There is no showing that adopting the negative inference proposed by the defendants and, thereby, denying the inhabitants of the District the right

to vote for voting representation in the House of Representatives would further that policy purpose,[38] or that the Framers thought that it would.[39]

(ii) James Madison

In The Federalist Number 43, in discussing the Seat of Government, James Madison wrote:

> as [the federal district] is to be appropriated to this use with the consent of the State ceding it; as the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it; as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they will have had their voice in the election of the government which is to exercise authority over them; as a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them; and as the authority of the legislature of the State, and of the inhabitants of the ceded part of it, to concur in the cession will be derived from the whole people of the State in their adoption of the Constitution, every imaginable objection seems to be obviated.

The Federalist No. 43, at 272-73 (James Madison) (emphasis

[38] Indeed, the ultimate test might well be: would voting for representation in the House of Representatives interfere with the special authority of the federal government in respect to the federal enclave that is the Seat of Government. It seems obvious that a voting representative in the House of Representatives for District residents would no more "interfere[] with the jurisdiction asserted by the Federal Government," than did Kentucky's imposition of a license tax on residents of a federal enclave, approved by the Supreme Court in *Howard v. Commissioners of Sinking Fund*, 344 U.S. 624 (1953).

[39] Indeed, in other instances where the Framers were particularly concerned about the influence of States, the denial of voting representation in Congress was never part of the solution. For example, to ensure the independence of Representatives and Senators, the Constitution provides that the National Treasury, not the States, pays their salaries. U.S. Const. art. I, § 6; *Term Limits*, 514 U.S. at 809-10. Similarly, to ensure the independence of Article III Justices and judges, Article III guarantees life tenure during good behavior, and proscribes diminution of judges' compensation while in office. *See* The Federalist No. 79 (Alexander Hamilton). If the Framers thought that denial of voting representation in Congress was necessary to assure independence from the States, they should have also denied it to Representatives, Senators and, particularly, Article III judges.

added). It has been suggested that the "plain meaning" of Madison's statement that the inhabitants of the District "will have had their voice" is that "only the first generation of District residents will have had a vote with respect to their destiny." Stephen J. Markman, Statehood for the District of Columbia 39 (1988). Markman explains:

> [Madison] speaks in the future perfect tense, "they will have had their voice." If he meant that District residents would have a continuing voice in the national government, the proper language would have been "they will have their voice."

Id. However, a more plausible reading, context considered, is that Madison's statement is, at most, ambiguous on the question of District citizens' right to vote for voting representation in Congress.

Interpreting Madison's statement that the inhabitants of the Seat of Government "will have had their voice in the election of the government which is to exert authority over them" as a concession that those inhabitants would permanently lose their voice in congressional elections is in substantial tension with – in fact, seems to contradict – the natural reading of other contributions to The Federalist by Madison. A basic principle of Madison's conception of the House of Representatives was that, under the Constitution, the authority of the sitting Congress over the People derives from the most recent election and continues only until the next one. *See* The Federalist No. 52, at 330 (James Madison) ("the greater the power is, the shorter ought to be its duration"). Under Article I, the composition of the government which is to exercise authority over the District changes with each biennial federal election. If District inhabitants are unable to participate in the election of each new Congress, they have not "had a voice" in the election of their government merely because they once had a voice in the election of a predecessor government. Thus, Madison's statement is arguably consistent with the prospect that District inhabitants would have voted for the incumbent Congress or government and would expect to vote every two years thereafter for each of the successor

Congresses or governments.

Moreover, Madison also stated that "every imaginable objection seems to be obviated." The Federalist No. 43, at 273 (emphasis added). It is difficult to reconcile that statement with an interpretation that inhabitants of the District would have only one last chance to elect representatives to a single session of the House of Representatives, while new Congresses, elected every two years, would continue to exercise authority over them *ad infinitum*, without their being represented there. It is difficult to believe that Madison, his strong views about representative government and individual rights considered, could not imagine anyone objecting to such disenfranchisement. In point of fact, the District residents of the area ceded by Madison's very own Virginia objected so vigorously and so long to their lack of voting representation in Congress that they ultimately persuaded Congress to cede that area back to Virginia. *See supra* note 23. Indeed, Madison's conclusion that every objection would be obviated followed his statement that "the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting [the federal district]." Madison might well have been assuming that the Constitution required the ceding State to provide for the protection of certain rights, including the right to vote for voting representation in the House of Representatives, if not by the ceding State, then by the United States as a state-imposed condition of the cession. Of course, Maryland did no such thing, further reducing the precedential force Madison's ambiguous observation.

The substantive problems flowing from interpreting Madison as recognizing that the inhabitants of the District would be denied their right to vote for voting representation in Congress are far more troubling than any purported grammatical awkwardness which may result from a contrary interpretation. Therefore, I conclude that Madison's statement does not necessitate a conclusion that the Framers intended to deny the people of the District the right to vote for voting representation in the House of Representatives or that the references to "States" should be interpreted to have that

effect.

(iii) Alexander Hamilton

Alexander Hamilton, a vigorous proponent of the Constitution, unsuccessfully offered the following amendment during the New York ratifying convention:

> That When the Number of Persons in the District of Territory to be laid out for the Seat of the Government of the United States, shall according to the Rule for the Apportionment of Representatives and direct Taxes amount to ____ such District shall cease to be parcel of the State granting the Same, and Provision shall be made by Congress for their having a District Representation in that Body.

5 The Papers of Alexander Hamilton 189-90 (Harold C. Syrett & Jacob E. Cooke eds., 1962). Although the amendment, had it been ratified, would have ensured District inhabitants the future right to vote for voting representation in Congress, it does not follow that its failure of adoption necessitates denial of that right.

So far as I have been able to determine from the parties' submissions and other research, neither the records of the New York convention nor Hamilton's papers reveal any remarks by Hamilton explaining his proposal. *See* Papers of Alexander Hamilton. One possible interpretation is that the amendment was designed to provide a formula for District representation because Article I would require such representation for the District once it was created. Another is that Hamilton believed that, absent his amendment, the District would remain part of the ceding State to the extent that its residents would vote through that State's apparatus. Also, Hamilton's proposal is consistent with the possibility that Hamilton believed that an amendment to the Constitution would be required to allow the people of the District to vote. Given the number of alternative explanations of this amendment, all of which are speculative, I would conclude that the mere existence of this proposed amendment is not significant evidence that the Framers intended to deny the

people of the District the right to vote for voting representation in Congress or that the references to "States" were intended to have that effect.

(iv) Thomas Tredwell

Thomas Tredwell argued in the New York ratifying convention that inhabitants of the proposed Seat of Government would not and should not be able to participate in congressional elections:

> The plan of the federal city, sir, departs from every principal of freedom, as far as the distance of the two polar stars from each other; for, subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote, is laying a foundation on which may be erected as complete a tyranny as can be found in the Eastern world.

2 Elliot's Debates at 402, *reprinted in* 3 Kurland and Lerner, *supra* note 12, at 225 (emphasis added). However, Tredwell opposed not only the Seat of Government clause, but the entire Constitution. As such an opponent, his characterization of the Constitution's effect on District inhabitants is "entitled to little weight." *Ernst & Ernst v. Hochfeller*, 425 U.S. 185, 203 n.24 (1976) ("Remarks of this kind made in the course of legislative debate or hearings other than by persons responsible for the preparation or the drafting of a bill, are entitled to little weight. This is especially so with regard to the statements of legislative opponents who in their zeal to defeat a bill understandably tend to overstate its reach.") (internal citations, ellipsis and quotation marks omitted); William N. Eskridge, Jr., *Should the Supreme Court Read the Federalist but not Statutory Legislative History?*, 66 Geo. Wash. L. Rev. 1301, 13__ (1998) ("[Opponents'] strategic statements are worth little in understanding the provision if it is adopted, because their incentives are to exaggerate and distort the meaning and effect of the provision."). Accordingly, Tredwell's statements shed little, if any, light on the Framers' intent with respect to the voting rights of the inhabitants of the

District or the interpretation of the references to "States" in Article I.

(v) Organic Act

There were statements made at the time of the enactment of the Organic Act in 1801 which assume that its enactment would have the effect of terminating the right of inhabitants of the District to vote for voting representation in the House of Representatives.[40] I do not consider those statements to be persuasive evidence that the Framers of the Constitution intended such a outcome to result from their use of the term "States" or from the language of any other provision in the Constitution. The Organic Act debates occurred over fourteen years after the Constitutional Convention and over ten years after the First Congress selected the location of the Seat of Government. The views of individual participants in those debates, even if they could be attributed to the Sixth Congress as a whole, would be an unreliable indication of the understanding of the Founders during the time before the location of the Seat of Government had been determined. Defendants do not suggest that those who made the statements participated in the Convention or were "au courant" in 1787. Moreover, given the modest size of the District's population in 1801, the drafters of the Organic Act might well have assumed, without knowing, that the Framers had simply not considered providing affirmatively, yet not affirmatively precluding, for voting representation for the District's relatively few inhabitants. A member of Congress and two Senators representing 8,000 souls could have very awkward and disruptive of the power balance. Had populous New York or Philadelphia been chosen as the permanent Seat of Government, however ,– certainly a possibility in 1787, *see supra* Part I.B.1 – it seems unlikely that 1801 Congressmen would have seen the denial of voting representation for the District's population as the Framers' manifest design. These facts make it, in my view, unreasonable to assume that the views expressed at the time of the adoption of the Organic Act

[40] *See* Maj. Op. at notes 29, 30, 32, 34 and accompanying text.

reliably reflect any decision by the Framers, which would have necessarily been formed without knowing whether the site of the Seat of Government would be New York, Philadelphia, or some other place, urban or rural.

(vi) *Loughborough*

Finally, there is Chief Justice Marshall's 1820 statement in *Loughborough* that the inhabitants of the District were "a part of the society . . . which has voluntarily relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government." 18 U.S. at 324. Defendants rely very heavily upon the *Loughborough* statement because, among other things, Chief Justice Marshall was present at the creation. As Justice Jackson put it so elegantly, the Chief Justice "wrote from close personal knowledge of the Founders and the foundation of our constitutional structure . . . ." *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 586-87 (1949). But the *Loughborough* dictum does not necessarily support defendants' persistent contention that the Constitution *ab initio* precluded voting representation in Congress for inhabitants of the Seat of Government, wherever it might ultimately be. Rather the *Loughborough* dictum can better be read to mean what it says and clearly implies: Chief Justice Marshall believed that some time after the Constitution was ratified, the "part of the society" constituting inhabitants of the District "voluntarily relinquished" voting rights that they had previously enjoyed, including specifically, apportioned rights to representation in the House of Representatives. However, the *Loughborough* dictum cannot be reconciled with the present understanding of the nature of constitutional rights – including rights under the original Constitution. The parties have not cited (and my research has not disclosed) any documentary evidence that inhabitants of the District ever actually waived their voting rights individually or collectively, either before cession or after it. Finally, as previously discussed, the concept of relinquishment "by constructive consent is not a doctrine commonly associated with surrender

of constitutional rights." *College Savings Bank*, 119 S. Ct. at 2229 (quoting Edelman, 415 U.S. at 673); *Lucas*, 377 U.S. at 736; *see supra* Part II.B. Accordingly, this dictum does not necessitate a conclusion that by using the word "States" in Article I or in drafting any other provisions of the Constitution in 1787 the Framers intended to deny to the inhabitants of the yet-to-be-selected Seat of Government the right to vote for voting representation in the House of Representatives.

c. Parallel Constitutional Provisions

The use of the term "State" in parallel provisions of the Constitution does not necessitate or justify the negative inference proposed by the defendants. To the contrary, as Supreme Court decisions make clear, the term "State" is not necessarily interpreted as meaning "and not the District of Columbia."

The defendants rely heavily on the Supreme Court's decision in *Hepburn & Dundas v. Ellzey*, 6 U.S. 445 (1805). In *Hepburn*, the Supreme Court considered whether citizens of the District could bring suits in federal court. Section 11 of the Judiciary Act of 1789 gave federal courts jurisdiction to hear cases where "the suit is between the citizen of the State where the suit is brought, and a citizen of another State." 1 Stat. 73, 78. The Court looked to Article III of the Constitution, which confers power on the federal courts to hear suits "between Citizens of different States," to answer the question of whether the reference to "States" in the statute included the District. The *Hepburn* Court concluded that the reference to "States" in the Constitution, and therefore in the statute, did not include the District. *Id.* at 452-53. However, it did not consider whether the reference to States in Article III precluded jurisdiction over suits between citizens of the District and citizens of a State.

In 1948, Congress enacted a statute that treated the District as a State so that its residents could maintain diversity suits in federal courts. 62 Stat. 869 (codified at 28 U.S.C. § 1332(d)). In 1949, the Supreme Court upheld that statute as an appropriate exercise of Congress' power under the District

Clause, even though Article III, § 2, clause 1, only refers to cases "between Citizens of different States." *Tidewater*, 337 U.S. 582. There is no majority opinion. However, the *Tidewater* holding confirms what is now the law: the Constitution does not bar Congress from conferring federal diversity jurisdiction in cases brought by a District resident even though that individual is not literally a citizen of a "State." Accordingly, the use of the term "State" in the diversity jurisdiction clause of the Constitution cannot mean "and not of the District of Columbia."

Similarly, the Supreme Court has held that the Full Faith and Credit clause in Article IV of the Constitution, which provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State," U.S. Const. art. IV, § 2, binds the courts of the District equally with the courts of the States. *Loughran v. Loughran*, 292 U.S. 216, 228 (1934).

Further, if the references to "States" in Article I, § 2, necessarily exclude the people of the District, then the reference to "Citizens of each State" in Article IV, § 2, clause 1, would prohibit the enjoyment of an enforceable right to travel by District citizens. Article IV, § 2, clause 1, guarantees that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States" (emphasis added). This provision of the Constitution protects a fundamental component of the right to travel, "the right of a citizen of one State . . . to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State." *Saenz v. Roe*, 119 S. Ct. 1518, 1525 (1999). The privileges and immunities clause of Article IV "provides important protections for nonresidents who enter a State whether to obtain employment, to procure medical services, or even to engage in commercial shrimp fishing." *Id.* at 1526 (internal citations omitted). It defies common sense to suppose that the clause implicitly requires the denial of an enforceable right to travel to citizens of the District, leaving treatment of District citizens to the exclusive discretion of each State they visit. It is only slightly less implausible to

imagine that the Framers meant to leave District citizens' right to travel dependent upon the legislative grace of Congress. In any event, the implausibility of these two interpretations of the Article IV privileges and immunities clause – that it prohibits a right to travel for District citizens, or that it neither prohibits nor guarantees such a right – suggests that neither interpretation follows simply from the application of common sense to the plain language of the clause.

Accordingly, the interpretations of the term "State" in other provisions of the Constitution support a conclusion that the references to "States" in Article I do not necessarily imply "and not the District of Columbia."

d. Democratic principles

As reiterated by the Supreme Court in *Term Limits* and *Powell*, interpretation of the Constitution, particularly Article I, should be guided by the fundamental democratic principles upon which this nation was founded. *Powell*, 395 U.S. at 547; *Term Limits*, 514 U.S. at 819-823. Absent any persuasive evidence that the Framers' intent in using the term "State" was to deny the inhabitants of the District the right to vote for voting representation in the House of Representatives, a consideration of fundamental democratic principles further supports the conclusion that the use of that term does not necessitate that result.

A republican, that is representative, form of government, is a keystone in the Constitution's structure, a keystone hewn directly from the Declaration of Independence; the denial of representation was one of the provocations that generated the Declaration and the War that implemented it.[41] Article I creates the republican form of the national government; Article IV guarantees that form to each state and its people.

Recent Supreme Court analysis confirms the continuing vitality of these principles. As Justice Kennedy, writing for the

[41] For example, the Declaration stated that the King: "has refused to pass other Laws for the Accommodation of large Districts of People, unless those People would relinquish the Right of Representation in the Legislature, a Right inestimable to them, and formidable to Tyrants only." The Declaration of Independence ¶ 5 (U.S. 1776).

Court, aptly described it:

> By splitting the atom of sovereignty, the founders established two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.

Alden v. Maine, 119 S. Ct. 2240, 2265 (1999) (internal quotations omitted). Thus, the people of each state are sovereign in that state; the people of the Nation are sovereign vis-a-vis the national government. As the Supreme Court has explained:

> [R]epresentatives owe primary allegiance not to the people of a State, but to the people of the Nation. As Justice Story observed, each Member of Congress is "an officer of the union, deriving his powers and qualifications from the constitution, and neither created by, dependent upon, nor controllable by, the states. . . . Those officers owe their existence and functions to the united voice of the whole, not of a portion, of the people."

Term Limits, 514 U.S. at 803 (quoting 1 Story § 627). The Court emphasized that "the right to choose representatives belongs not to the States, but to the people. . . . Thus the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by the States, but by the people." *Term Limits*, 514 U.S. at 820-21 (emphasis added). The Court found the principle firmly grounded in Chief Justice Marshall's oft-cited observation that

> [t]he government of the Union, then, . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

Id. (quoting *McCulloch*, 17 U.S. at 404-05).

Reciprocally, the authority of the national government operates directly upon the people, as distinguished from the

states themselves.

> [T]he constitutional design secures the founding generation's rejection of the concept of a central government that would act upon and through the States in favor of a system in which the State and Federal Governments would exercise concurrent authority over the people – who were, in Hamilton's words, "the only proper objects of government."

Alden, 119 S. Ct. at 2247 (quoting The Federalist No. 15, at 109) (Alexander Hamilton) (other internal quotations omitted); *Term Limits*, 514 U.S. at 803 ("In adopting [the Constitution], the Framers envisioned a uniform national system, rejecting the notion that the Nation was merely a collection of States, and instead creating a direct link between the National Government and the people of the United States."); *New York v. United States*, 505 U.S. 144, 166 (1992) ("[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.").

The importance of voting by the people in a representative democracy, such as the Constitution established, is so obvious that it is difficult to articulate its provenance. Yet, there is no dispute that voting by the people and the existence of a representative democracy are inextricably linked. One simply cannot exist without the other. As the Supreme Court has repeatedly recognized, following the words of Alexander Hamilton, it is a "fundamental principle of our representative democracy . . . that 'the people should choose whom they please to govern them.'" *Term Limits*, 514 U.S. at 795 (quoting *Powell*, 395 U.S. at 547 (quoting 2 Elliot's Debates 257)). As the *Reynolds* Court observed, "the right of suffrage is a fundamental matter in a free and democratic society" and "the right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." 377 U.S. at 555, 561.

Thus, the very structure of the national government, subjected by the Constitution to the ultimate sovereignty of the people, strongly negates the argument that either the

Article I references to "States," or the absence of any mention of voting for the people of the District in the District Clause, necessarily precludes voting by and representation of the people of the District. Accordingly, the democratic principles reflected in the structure of the government created pursuant to the Constitution weigh decisively against the negative inference proposed by the defendants – an inference that would result in the denial of the right to vote for voting representation in the legislature with exclusive authority over the District.

For all of the above reasons, the literal references to the "States" in Article I do not necessitate denying to the people of the District the right to vote for voting representation in the House of Representatives.

3. Twenty-Third Amendment

Defendants also argue that the adoption of the Twenty-third Amendment, giving the people of the District to right to choose electors to participate in the elections of the President and Vice-President, necessarily means that a similar constitutional amendment would be required to provide the inhabitants of the District with the right to vote for voting representation in the House of Representatives. First, the defendants maintain the adoption of the amendment "confirm[s] the understanding and intent of both Congress and the people of the ratifying States that the District of Columbia is not otherwise a 'State' for purposes of federal elections except as provided for by this Amendment." Sec'y Opp. at 12-13; *see also* Memorandum of Points and Authorities in Support of the Motion to Dismiss of Defendants Robin H. Carle, Wilson Livingood and James M. Eagen III, and Opposition to Plaintiffs' Motion for Summary Judgment in *Alexander, et al. v. Daley, et al.* at 23-24 (filed Dec. 18, 1998) ("House Officers Opp."). However, the suggestion that the understanding of the people adopting a constitutional amendment in 1961 could confirm the 1787 understanding of the Framers of the Constitution appears to have no precedent in constitutional interpretation.

Next, the defendants point to the legislative history of the amendment which includes the statement that it "would not authorize the District to have representation in the Senate or the House of Representatives." H. Rep. No. 86-1698, at 2-3, *reprinted in* 1960 U.S.C.C.A.N. 1459, 1462. Of course, no one is suggesting that the Twenty-third Amendment authorizes such representation.

Finally, the defendants argue plaintiffs' position must be rejected because "if plaintiffs' argument were correct, the 23rd Amendment would have been unnecessary." House Officers Opp. at 24. The defendants invoke Chief Justice Marshall's statement in *Marbury v. Madison* that "[i]t cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such construction is inadmissible, unless the words require it." 5 U.S. 137, 174 (1803). First, there is only a presumption, and not a rigid rule, against interpretations that yield superfluous constitutional provisions. For example, the Supreme Court has noted that Article I, section 8, clause 14, of the Constitution, which spells out Congress' power "[t]o make Rules for the Government and Regulation of the land and naval Forces," is "technically superfluous," *United States v. Stanley*, 483 U.S. 669, 682 (1987), in light of Article I, section 8, clause 18 – the Necessary and Proper Clause. *See also* Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 Val. U. L. Rev. 1 (1998); Sanford Levinson, *Accounting for Constitutional Change*, 8 Const. Commentary 409, 422-28 (1991). Second, the application of the presumption can, at best, only illuminate the meaning of the Twenty-third Amendment, not provisions of the original Constitution, such as Article I. The logic of the presumption is that the drafters of a document are unlikely to have included redundancies, but, of course, the drafters of Article I did not include the Twenty-third Amendment. In light of these considerations, the adoption of the 23rd amendment should not be relied upon in interpreting the original constitutional provisions at issue here. For the same reasons, the proposed, but never adopted, amendments pertaining to voting by District inhabitants shed no light on the

issues before us.[42]

4. Territories

Two circuits have concluded that residents of the Territories have no right to participate in the election of the President or Vice President. *See Igartua de la Rosa v. United States*, 32 F.3d 8 (1st Cir. 1994) (per curiam), *cert denied*, 514 U.S. 1049 (1995); *Attorney General of Guam v. United States*, 738 F.2d 1017 (9th Cir. 1984), *cert. denied*, 469 U.S. 1209 (1985). Assuming, *arguendo*, that citizens of territories also lack the right to vote in Congressional elections, that would not necessitate denying the people of the District the right to vote for voting representation in the House of Representatives. No territory or its inhabitants were ever part of the "several States"; nor did the inhabitants of our territories ever vote for representation in the House. Nor were the people in the territories, or their forbears, ever ceded there. In contrast, the inhabitants of the District today are the political posterity of the original people of the District, who were, until ceded to the United States, "people of the several States" who voted in federal elections until 1801. Citizens of the territories cannot claim a similar provenance. The foregoing considered, it simply does not follow that because people of the territories have never been entitled to voting representation in Congress that the people of the District must necessarily be denied renewal of their right to vote for voting representation in the House of Representatives.

[42] In 1978, Congress approved and submitted to the states for ratification an amendment to the Constitution providing that "for purposes of representation in Congress . . . the District . . . shall be treated as though it were a State." H.R.J. Res. 554, 95th Cong., 2d Sess. (1978). Only sixteen states approved it. *D.C. Vote Amendment Dies*, Cong. Q. 404, 404-05 (1985 Almanac). History records that, over the years between 1801 and 1978, Congress entertained up to 150 resolutions to amend the Constitution "to provide the District with some measure of voting to enfranchise District residents." *District of Columbia Representation in Congress: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., at 353-54 (1978) (Issue Brief, Congressional Research Service). After the failure of the 1978 amendment, a principal sponsor observed: "We all know what's going on here. Opponents of statehood have felt in the past that the District of Columbia is too urban, too liberal, too Democratic, too black." 124 Cong Rec. 26345 (1978) (statement of Sen. Kennedy).

5. Lapse of Time

The mere fact that nonvoting by the people of the District has been a continuous and unbroken practice since 1801 does not necessitate denying the people of the District today the right to vote for voting representation in the House of Representatives.[43] The Supreme Court has never hesitated to recognize constitutional rights, no matter when recognition is sought and no matter how long practices to the contrary have continued. Not so long ago, the Court observed, "That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date." *Powell*, 395 U.S. at 546-47; *cf. Puerto Rico v. Branstad*, 483 U.S. 219, 229 (1987) ("Long continuation of decisional law or administrative practice incompatible with the Constitution's requirements cannot overcome this Court's responsibility to enforce those requirements.").

The Supreme Court has a long history of recognizing previously unrecognized constitutional rights. For example, its landmark decision in 1954 that racial segregation of public school students violated the Fourteenth Amendment, *see Brown v. Board of Education*, 347 U.S. 483 (1954), reversed its 1896 decision that "separate, but equal" was all the equal protection clause required, *see Plessy v. Ferguson*, 163 U.S. 537 (1896). In 1964, the Court adopted the one-person, one-vote maxim as the standard for state legislative apportionment, *Reynolds*, 377 U.S. at 568, even though, as Justice Frankfurter had pointed out in an earlier dissent in "[t]he notion that representation proportioned to the geographic spread of population," had "never been generally practiced, today or in the past," *Baker v. Carr*, 369 U.S. 186, 301 (Frankfurter, J., dissenting). In 1986, the Court held that racially-based peremptory challenges violated the equal protection clause, *see Batson v. Kentucky*, 476 U.S. 79, 100 (1986), reversing its 1965 decision holding that peremptory challenges were immune from equal protection scrutiny largely because such scrutiny "would entail a radical change in the nature and operation of the challenge," *Swain v. Alabama*, 380 U.S. 202,

[43] From the perspective of an 80 year old, 200 years is not all that long a time.

221-22 (1965). In *Roe v. Wade*, 410 U.S. 113 (1973), the Court held that the right to privacy encompassed a woman's right to seek an abortion, even though abortion had long been treated as a crime in many states. Poll taxes, grandfather clauses, and white primaries were once commonplace; all are now unconstitutional. *See Harper*, 383 U.S. 663; *Guinn v. United States*, 238 U.S. 347 (1915); *Smith v. Allwright*, 321 U.S. 649 (1944). Just this past year, the Supreme Court severely curtailed Congress' power to abrogate States' sovereign immunity, despite years of permitting it virtually free rein in that area. *Alden*, 119 S. Ct. 2240. And, of course, the literal application of the Bill of Rights to the States was not recognized until many years after adoption of the Fourteenth Amendment, and then only by a gradual process. *Compare, e.g., Adamson v. California*, 332 U.S. 46 (1947) *with Malloy v. Hogan*, 378 U.S. 1, 4-6 (1964) *and Gideon v. Wainwright*, 372 U.S. 335, 341-345 (1963).

For years, many voter apportionment issues never reached the courts because it was accepted doctrine that the apportionment of legislative districts involved a political question beyond the reach of the judiciary. *See, e.g., Colegrove v. Green*, 328 U.S. 549 (1946). It was not until the Court's 1962 decision in *Baker*, 369 U.S. 186, overruling *Colegrove*, that the courts began to address many long-suffered voting rights deprivations. Thus, as a practical matter, until *Baker v. Carr*, a suit like the plaintiffs would have been an exercise in futility.

III
EQUAL PROTECTION

The *Wesberry* Court notably limited to Article I its analysis of "one person, one vote" in congressional elections, putting aside any consideration of other constitutional provisions as sources of the right to vote. *Wesberry*, 376 U.S. at 9 n.10. The principle of *Wesberry*, standing alone, requires that the people of the District, the political posterity of the pre-1801 voters, who were "people of the Several States," be given the opportunity to vote for a Member of the House of

Representatives. Even if *Wesberry* itself did not mandate this conclusion, the plaintiffs argue, and I am persuaded, that the Equal Protection Clause of the Fourteenth Amendment, made applicable to the United States and its officers by the Fifth Amendment, provides a strong additional ground for a declaration that the inhabitants of the District have a constitutional right to vote for voting representation in the House of Representatives and that the failure of the Secretary to include inhabitants of the District in the apportionment violates equal protection principles. Accordingly, the Secretary has a constitutional duty to include the people of the District in any future apportionment and to calculate and report to the President the representation commensurate with such apportionment.

The Equal Protection Clause of the Fourteenth Amendment provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Supreme Court has held that the principles embodied in this clause apply equally to the federal government, for the benefit of persons residing in the District of Columbia, by virtue of the due process clause of the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (holding that the principles embodied by the equal protection clause of the Fourteenth Amendment that prohibited States from maintaining racially segregated schools were applicable in the District of Columbia by virtue of the Fifth Amendment due process clause); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (noting that "[t]his Court's approach to the Fifth Amendment equal protection claims has . . . been precisely the same as to equal protection claims under the Fourteenth Amendment"); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217-18 (1995) (confirming continued vitality of *Weinberger*).

Basic equal protection principles require government, state and national, to treat similarly situated persons equally, particularly with respect to constitutionally-based rights and privileges. *See, e.g., Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985); *Plyler v. Doe*, 457 U.S. 202, 216-217 (1982).

The equal protection clause embodies a three-tiered system of review. Generally, the classification at issue is subject to "ordinary scrutiny." Under this test, the classification satisfies the requirements of equal protection as long as it is rationally related to a legitimate government end. *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1988); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973); *Plyler*, 457 U.S. at 217-18. At the other end of the spectrum are racial classifications and other governmental actions that impact on fundamental rights. These are subject to "strict scrutiny"; the government must demonstrate a compelling interest, and the classification must be narrowly tailored to meet that end. *See, e.g., Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666 (1990); *Plyler*, 457 U.S. at 217. In the middle are classifications involving, for example, gender, which are subject to "intermediate scrutiny" – the end must be important, the means substantially related to the end. *See, e.g., Craig v. Boren*, 429 U.S. 190, 197 (1976). Application of any of these tests to continued denial of the right of District inhabitants to vote for voting representation in the House of Representatives should yield the same result: the equal protection clause entitles them to such representation because the United States has no interest, compelling or otherwise, in denial of it.

With respect to voting, the Supreme Court has held that the right to cast votes of equal weight in the selection of representatives to a legislature is a fundamental right whose denial must be subject to the strictest scrutiny. *See Reynolds*, 377 U.S. at 562 ("Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."); *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) ("[I]f a challenged statute grants the right to vote to some citizens and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." (internal quotation marks omitted)); *Harper*, 383 U.S. at 665 ("[O]nce the

franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."). As the Court explained in *Reynolds v. Sims*, in invalidating malapportioned state legislative districts:

> Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status.

377 U.S. at 565 (internal citations omitted) (emphasis added).

The people of the District of Columbia are citizens of the United States, are subject to the laws passed by the Congress of the United States, and are the political posterity of the residents of the area which became the District in 1801, who voted for Congressional representation from 1790 until ceded to the United States in 1800. The population of the District has always been included in the decennial census. Yet, for the purpose of allocating seats in the House of Representatives, it is the practice and intention of the Secretary to exclude the District and the people there. Thus, the federal government treats the people of the District of Columbia differently from people residing in States, who are apportioned seats in the House of Representatives. In addition, the people of the District are treated differently from people residing in federal enclaves, over which Congress holds the same constitutional power of "exclusive legislation" that it holds over the people of the District. U.S. Const. art. I, § 8. Yet, the inhabitants of enclaves are included in apportionment and vote in Congressional elections in the state within which the federal enclave exists. *Evans v. Cornman*, 398 U.S. 419, 426 (1970) (people of enclave are also people of state surrounding enclave). The people of the District have no such apportionment or vote. Finally, the people of the District are treated differently from United States citizens who reside overseas, who, by virtue of the Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. 99-410, 100 Stat. 924 (1986) (codified at 42 U.S.C. § 1973ff et seq.) (Overseas Voting

Act), vote in Congressional elections in the state where they most recently lived.

None of the defendants disputes the fundamental nature of the right to vote, or that, generally, classifications, including classifications according to place of residence, impacting on that right must be subject to strict scrutiny. Nor do they contend that the federal government has a compelling interest that could justify depriving the people of the District of their right to vote for congressional representation. For the most part, the defendants argue, on several different grounds, that principles of equal protection simply do not apply. The closest they come to addressing the equal protection issue head on is to argue that if the plaintiffs' equal protection claim is accepted, then felons, minors and residents of territories must also be enfranchised. *See* House Officers' Reply to *Alexander* Plaintiffs' Consolidated Memorandum in Opposition to Defendants' Motions To Dismiss, and Reply in Support of Ps' Motion for Summary Judgment at 19 (filed Mar. 10, 1999) ("House Officers' Reply"). I will address each argument in turn. I find none persuasive.

First, the defendants argue that for equal protection to apply, the plaintiffs must have a preexisting constitutional right to vote. As Article I cannot be the source of that right, in their view, there is no cognizable equal protection claim. *See* Reply Memorandum of Secretary Daley and the United States in Support of Their Motion to Dismiss the Claims Brought by the *Alexander* Plaintiffs at 9-10 (filed Mar. 8, 1999). As I disagree with the defendants' premise that the people of the District do not have a preexisting constitutional right to vote, I see no merit in this argument. As previously explained in detail, the people of the District are the political posterity of the people who lived in the District between 1790 and 1800. Those people had and exercised a constitutional right to vote for Congressional representation. Neither cession or any other event in the intervening years could have constitutionally taken away that right. Nor is the denial of that right mandated by the Constitution or reasonable negative inferences from it. Accordingly, the people of the District have a constitutional

right to vote, albeit one that has been dormant since 1800; continued denial of that right where there is no compelling governmental interest violates equal protection principles.

Next, the defendants argue that the equal protection claims are invalid on their face because any statutory restriction on the plaintiffs' right to vote is merely reflective of the Constitution itself. If the Constitution precludes voting by DC, they argue, then there is no "constitutional" challenge that can be made to change that result. Secy' Opp. at 17. Again, as I disagree with the defendants' premise that the Constitution itself bars voting by the people of the District, *see supra* Part II, I see no merit in this argument either.

The defendants also argue that the equal protection clause does not apply because "plaintiffs have not challenged any classification actually drawn by Congress." House Officers' Opp. at 28. The plaintiffs respond that they are challenging "statutes and House and Senate rules – and [] the conduct of defendants in enforcing those statutes and rules." Alexander Plaintiffs Consolidated Memorandum in Opposition to Defendants' Motions to Dismiss, and Reply in Support of Plaintiffs' Motion for Summary Judgment at 4 (filed Feb. 8, 1999). The essence of the plaintiffs' case, however, is a challenge to the apportionment statute, as applied by the Secretary, which is properly subject to equal protection scrutiny. *Cf. Reynolds*, 377 U.S. at 568 (sustaining equal protection challenge to state apportionment scheme).

In addition, the defendants argue that equal protection principles cannot be applied because the people of the District are not "similarly situated" with respect to citizens of States, residents in federal enclaves, or overseas voters. The people of the District cannot be compared to citizens of States, they argue, because the Constitution itself, in Article I, Amendment XVII, and Amendment XIV, § 2, distinguishes between the two. *See* House Officers' Opp. at 28-29. Even assuming *arguendo* that the defendants are correct in stating that the Constitution "distinguishes" between the citizens of the District and citizens of States, that does not resolve the issue. As discussed *supra*, there is nothing in the Constitution

itself, or necessarily implied from it, that requires denying voting representation in Congress to the people of the District.[44] Moreover, the people of the District and citizens of States are similarly situated in that citizens of the States and the posterity of the pre-1801 District inhabitants are subject to the laws of the United States and, before the cession, both were inhabitants "of the several states." Accordingly, the two groups are "similarly situated" for equal protection purposes.

With respect to enclaves, the defendants argue that enclaves are significantly different from the District because residents of an enclave remain citizens of the State, enclaves do not change state boundaries, and states continue to exercise jurisdiction over enclaves. House Officers' Opp. at 29-30. However, the same clause of the Constitution authorizes the establishment of the District and federal enclaves and provides that Congress shall have the same power to exercise exclusive jurisdiction in each case. The people living in the areas that became the District, just as the people living in the areas that have become federal enclaves, had a constitutional right to vote for representation in Congress. The Supreme Court has held, in *Evans v. Comman*, 398 U.S. at 426, that residents of federal enclaves retain that right. The people of the District have the same interest as the people in federal enclaves, if not a greater interest, in having a voice in Congress, their ultimate legislature. At one time, when a presidentially-appointed three-person Board of Commissioners constituted the local legislative and executive authority in the District of Columbia (subject, of course, to Congress' exclusive legislation) there may have been a material difference between the political status of enclave

[44] It is noteworthy that the *Loughborough* Court approved direct taxation of District residents despite the fact that the tax apportionment requirement of Article I, like its voting apportionment requirement, referred only to apportionment among the several States. U.S. Const. art. I, § 2. The Court found that the negative inference, here invoked by defendants with respect to voting apportionment, was trumped by another provision of the Constitution: the taxing power vested in Congress by Article I. *Loughborough*, 18 U.S. at 322-23. So here, any such negative inference is trumped by other provisions of the Constitution, adopted in the wake of the Civil War and imported thereafter into the original Due Process clause of the Fifth Amendment: the Equal Protection clause.

people and the people of the District. However, since 1973, when Congress created a local government consisting of an elected mayor and an elected council with legislative authority (subject, of course, to Congress' exclusive legislation), and the equivalent of a state court system, the functional differences between the political status of District people and that of enclave people is more theoretical than real. Congress' exclusive legislative authority is ultimate. It can preempt any ordinance of the District Council and, it seems obvious, could also pre-empt any state law which purported to bind the people of any federal enclave in any state.

Defendants make much of the difference between Congress' exercise of its power of "exclusive legislation" with respect to the District and its exercise of its identical power with respect to the enclaves. They concede the obvious – that Congress' power with respect to the enclaves and with respect to the District is identical.[45] They disregard, however, the extent to which Congress' relaxation of its latent power with respect to the District parallels the relaxation with respect to the enclaves. Just as Congress has passed statutes permitting States to exercise their own authority in federal enclaves, so it has passed statutes permitting the District government to exercise its own authority within its enclave. For example, in federal enclaves, state criminal laws apply to "acts not punishable by any enactment of Congress," 18 U.S.C. § 13, states are permitted to levy and collect income, gasoline, sales and use taxes, 4 U.S.C. §§ 104-110, and state unemployment laws and workers' compensation laws apply, 26 U.S.C. § 3305; 40 U.S.C. § 290. Moreover, at least at the National Institutes of Health (NIH), the federal enclave whose status was at issue in the *Evans* case, residents register their cars in Maryland, obtain drivers' permits and license plates from Maryland, are subject to the process and jurisdiction of the Maryland state courts, and send their children to Maryland public schools. *Evans*, 398 U.S. at 424. Similarly, the District,

[45] For example, the National Institutes of Health became a federal enclave in 1953 when Maryland ceded jurisdiction over the property to the United States. *Evans*, 398 U.S. at 420-21 (citing Md. Code Ann. art. 96, § 34).

not the federal government, exercises direct, hands-on authority over motor vehicle registration and has its own school system. The District also has its own court system, completely independent of the federal courts, except that, like state courts, the decisions of its highest court are reviewable by the Supreme Court. District residents pay income, sales and other taxes to the District. In view of the foregoing, to distinguish the right of District residents to the same protection of the laws from that enjoyed by enclave residents is to belabor a distinction without a material difference. Accordingly, the apportionment statute, as applied by the Secretary, deprives the people of the District of equal protection of the laws because for apportionment it includes the census population of federal enclaves in the population of the state within which the enclave exists while excluding the census population of the District from the apportionment process.

The Overseas Voting Act, requires a State to "permit overseas voters" to participate (by absentee ballot) "in general elections for Federal office." 42 U.S.C. § 1973ff-1(3). An "overseas voter" includes "a person who resides outside the United States and (but for such residence) would be qualified to vote in the last place in which the person was domiciled before leaving the United States." *Id.* § 1973ff-6(5)(C). The Act does not require States to permit overseas voters to vote in local or state elections. Nor does an overseas voter under the Act need to be a citizen of the State where voting occurs.[46] As a result, an overseas voter, despite the language of Article I, may vote in federal elections without having "the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. art. I, § 2, cl. 1.

The defendants argue that inhabitants of the District and overseas voters are not similarly situated for equal protection purposes because Congress has authorized voting by overseas

[46] The Act expressly specifies that "[t]he exercise of any right under this subchapter shall not affect, for purposes of any Federal, State or local tax, the residence or domicile of a person exercising such right." 42 U.S.C. § 1973ff-5.

voters. *See* House Officers' Opp. at 27.[47] However, the critical fact for equal protection analysis is not that there is a statute giving overseas voters their voting rights, but that this Act permits voting in federal elections by persons who are not citizens of any State nor qualified under the literal terms of Article I to vote in federal elections,[48] while inhabitants of the District, who are similarly situated, are denied that right.

The defendants' suggestion that the Overseas Voting Act "extends" State citizenship to overseas voters in a manner that could not be applied equally to residents of the District is unsound. The Supreme Court has indicated that, at least with respect to elections of state officers, a State may limit participation to "bona fide residents" who live within its geographical boundary and have the intention to make the State their home indefinitely. *See Carrington v. Rash*, 380 U.S. 89, 94 (1965). An "overseas voter," however, does not reside within any State, and need not have any intention to make a particular State his or her home. *See Attorney General of Guam*, 738 F.2d at 1020. If Congress can disregard an overseas voter's failure to satisfy the two most basic traditional prerequisites for state citizenship, there is no reason why the fact that the overseas voter, unlike some residents of the District, was *recently* a bona fide resident of a State should be the distinction of ultimate constitutional dimension.

As the plaintiffs point out, if there is no constitutional bar to voting by overseas voters who are not "citizens of a State," there is no constitutional bar to voting by the people of the District. Accordingly, the inhabitants of the District and overseas voters are similarly situated and the extension of voting rights to one group, but not the other, must be justified

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[47] There is one difference – except for members of the Armed Forces living abroad, United States citizens overseas are there voluntarily. The political forebears of District inhabitants were ceded there without their consent.

[48] In fact, under the Overseas Voting Act, a United States citizen residing outside the United States may be eligible to participate in federal elections, even though he or she had never been eligible to participate in any election while a citizen of a State. For example, the Act applies to an overseas voter who was too young to vote while a citizen of a State.

by a compelling government interest.[49]

Given that inhabitants of the District and citizens of States, residents of enclaves and overseas voters are all similarly situated for equal protection purposes, and that the defendants do not argue that the government has any compelling interest in denying the right of District inhabitants to vote for voting representation in the House of Representatives, a right enjoyed by members of each of these other groups, the continued denial of that right violates equal protection principles. I have not overlooked that the defendants argue that the comparison to people in enclaves and overseas at most entitles the people of the District to vote

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[49] It is true that the First Circuit has asserted that, because the Overseas Voting Act "does not infringe [the right to vote] but rather limits a state's ability to restrict it," the Act "need only have a *rational basis* to pass constitutional muster." *Igartua de la Rosa*, 32 F.3d at 10 & n.2 (emphasis added). However, the Act goes beyond checking States' restrictions on the franchise; it permits voting by electors who are not eligible to vote for the most numerous branch of a State's legislature. Thus, it affirmatively extends the right to vote to United States citizens who are not literally qualified to vote under Article I, § 2, clause 1.

In applying the principles of equal protection in the context of State elections, the Supreme Court has made it clear that strict scrutiny is applied to State "statutes distributing the franchise" which have the effect that "some resident citizens are permitted to participate and some are not." *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 628-29 (1969); *see also Harper*, 383 U.S. at 665. These same principles apply to the federal government through the due process clause of the Fifth Amendment—not as a formality, but because essentially the same justification for strict scrutiny of *statutes* governing the right to vote applies to both federal and state laws:

> The presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.

Kramer, 395 U.S. at 628. The Overseas Voting Act is therefore squarely within the class of voting laws subject to strict scrutiny under the equal protection clause.

The majority also suggests that, in any event, citizens of the District who have never lived in any of the fifty states could not have an equal protection claim. The majority fails to suggest any compelling governmental interest in distinguishing between overseas voters and those District residents who have never lived in a State. Moreover, the majority apparently recognizes the violation of equal protection principles with respect to those District residents who previously have lived in a State.

for federal officers in State elections, not to elect their own Representatives. However, the fact that residents of enclaves and expatriates vote for federal officers in state elections does not necessarily imply that the only relief for the people of the District would be to vote in the elections of the state of Maryland. For residents of enclaves and overseas voters, voting in state elections can be seen as essentially a matter of convenience. As Marshall said about state ratifying conventions — where else should they vote? The pragmatic answer with respect to voting representation in the House of Representatives for the people of the District is that it is more convenient and logical that the political posterity of the pre-1801 voters for representation in the House should and could use the District apparatus for electing presidents, mayors and council members, available only in the last half of the Twentieth century.

Finally, the defendants argue that if the people of the District have an equal protection right to vote in Congressional elections, so too must felons, minors and residents of territories. However, equal protection principles do not dictate such a conclusion. Felons, for example, forfeit certain constitutional rights, including the right to vote, because of their criminal conduct. The government's interests in depriving felons of their voting rights, presumably deterrence and punishment, arguably compelling interests for equal protection purposes, bear no relation to the government's ephemeral interest, if any, in depriving the people of the District of voting rights merely because of the place where they live. Moreover, the Supreme Court has held that the Fourteenth Amendment, which provides that a State's representation in Congress shall not be reduced if it disenfranchises citizens for "participation in rebellion, or other crime," U.S. Const. amend. XIV, § 2, contemplates and approves of the disenfranchisement of convicted felons. *See Richardson v. Ramirez*, 418 U.S. 24, 54 (1974). The explicit constitutional recognition that felons can be disenfranchised, and the fact that their loss of voting rights is directly attributable to their own misconduct, is a material difference

which renders untenable any comparison of their nonvoting with recognizing the voting rights of the people of the District.

Nor does the nonvoting of minors as a group preclude restoration of voting representation for the people of the District on equal protection grounds. First, there has been no showing that minors (however defined) as a class ever voted. In contrast, residents of the District voted for a Member of the House of Representatives until 1801. Second, minors have never been considered as having the same constitutional rights as adults. *See Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 654 (1995) (upholding random urinalysis testing of minors in a public school); *Hutchins v. District of Columbia*, 188 F.3d 531, 541 (D.C. Cir. 1999) ("children's rights are not coextensive with those of adults"). Finally, although this precise issue has never been addressed, I believe that the government has a compelling interest in foreclosing minors, who are presumptively not qualified by intelligence or experience to participate in its political process, from voting. If not compelling, the government's interest is certainly important, arguably the applicable standard under the equal protection clause where it is the fundamental rights of minors being infringed.[50] *Hutchins*, 188 F.3d at 541 (applying heightened scrutiny). Accordingly, denying their voting rights while enfranchising the people of the District does not violate equal protection principles.

Finally, recognizing the voting rights of the people of the District would not necessitate enfranchising residents of United States territories. *See supra* Part II.C.4. To reiterate, people residing in territories, or their political predecessors, were never part of the "people of the several states" and they have never enjoyed a constitutionally protected right to vote.

[50] The Supreme Court recently reaffirmed that classifications based simply on age are not suspect under the equal protection clause and are evaluated only to determine whether they bear a rational relationship to a legitimate governmental interest. *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 645 (2000); *see also Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 316-17 (1976). That analysis does not dispose of the issue here, however, because a denial of the right to vote also infringes on a fundamental right which merits either strict or intermediate scrutiny.

Absent any such right, the people of the territories have no claim that they would be denied equal protection of the laws if District inhabitants have voting representation while the status quo is continued in the territories. For this reason, recognizing voting rights for the people of the District would not necessitate a similar result with respect to the people in the territories.

IV

Accordingly, for the reasons set forth, the people of the District of Columbia are entitled to participate in the election of members of the United States House of Representatives. The apportionment statutes, as presently applied, interfere with the exercise of constitutional rights of residents of the District of Columbia. I would declare these statutes, as applied, unconstitutional and declare that the Secretary of Commerce has a constitutional duty to include the population of the District of Columbia in the apportionment of seats to the House of Representatives. Again, as the questions with respect to the Senate and the Control Board are not a challenge to apportionment – the basis for convening this three-judge district court – I agree that this Court should "decline to exercise any discretionary jurisdiction we may have over" those claims. *Adams v. Clinton*, 40 F. Supp.2d 1, 5 (D.D.C. 1999).

DATED:

S/ LOUIS F. OBERDORFER
United States District Judge

CONSTITUTIONAL PROVISIONS

Article I, Section 8, Clause 17 (the "District/Enclaves Clause"):

> The Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings[.]

Article IV: Section 3, Clause 2 (the "Territories Clause"):

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States[.]

Amendment V (inherent "Equal Protection Provision"):

> No person shall . . . be deprived of life, liberty, or property, without due process of law.
>
> *Compare* Amendment XIV, Section 1 (explicit "Equal Protection Clause"):
>
> > No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATUTES

28 U.S.C. § 2284(a) provides:

> A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

2 U.S.C. § 2a(a) & (b) provide:

> (a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.
>
> (b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of the Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the Sergeant at Arms of the House of Representatives.

2 U.S.C. § 2b provides:

> Each State shall be entitled, in the Seventy-eighth and in each Congress thereafter until the taking effect of a reapportionment under a subsequent statue or section 2a of this title, to the number of Representatives shown in the statement transmitted to the Congress on January 8, 1941, based upon the method known as the method of equal proportions, no State to receive less than one Member.

2 U.S.C. § 2c provides:

> In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of section 2a(a) of this title, there shall be established by law a number of districts equal to the number of representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress).

2 U.S.C. § 26 provides:

> Before the first meeting of each Congress the Clerk of the next preceding House of Representatives shall make a roll of the Representatives-elect, and place thereon the name of those persons, and of such persons only, whose credentials show that they were regularly elected in accordance with the laws of their States respectively, or the laws of the United States. In case of a vacancy in the office of Clerk of the House of Representatives, or of the absence or inability of the Clerk to discharge the duties imposed on him by law or custom relative to the preparation of the roll of Representatives or the organization of the House, those duties shall devolve on the Sergeant at Arms of the next preceding House of Representatives.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Twenty Citizens of the District of Columbia, *namely*:	
	CASE NUMBER:
Lois E. Adams, 2712 Wisconsin Ave., N.W. Apt. 508, Wash., D.C. 20007;	98CV01665
Rev. Mr. Floyd H. Agostinelli, 1801 Kearney St., N.E., Wash., D.C. 20018;	JUDGE: Louis F. Oberdorfer
Acie L. Byrd, Jr., 3601 Wisconsin Ave. N.W., Apt. 603, Wash., D.C. 20016;	DECK TYPE: Three Judge Court
Lawrence Alston Gray, 600 14th St., N.E., Wash., D.C. 20002;	
Rev. Graylan Scott Hagler, 6101 16th St., N.W. Apt. 927, Wash., D.C. 20011;	DATE STAMP: 06/30/98
Lawrence Benjamin Harris, 1327 Holbrook St., N.E., Wash., D.C. 20002;	
Richard Hébert, 2801 Adams Mill Rd., N.W., Wash., D.C. 20009;	
Wimberly Higgs, 232 14th Pl., N.E., Wash., D.C. 20002;	
Bette J. Hoover, 626 Quebec Pl., Wash., D.C. 20010;	
Anise Jenkins, 1715 4th St., N.W., Wash., D.C. 20001;	
Rahim Jenkins, 1238 Southern Ave., S.E., Wash., D.C. 20032;	
Marilyn Killingham, 1100 6th St., S.W., Wash., D.C. 20024;	
Dujuan Ricardo Malachi, 5554 Chillum Pl., N.E., Wash., D.C. 20011;	
Lamont B. Mitchell, 1651 38th St., S.E., Wash., D.C. 20020;	
Loree H. Murray, 1134 7th St., N.E., Wash., D.C. 20002;	

Rev. Anita O'Brien-Russell, 660 Acker St., N.E., Wash., D.C. 20002; Antoinette Quick, 2610 Naylor St., S.E., Apt. 301, Wash., D.C. 20020; Sam Smith, 3149 Newark, N.W., Wash., D.C. 20008; Manuel Uriarte, 1304 Girard St., N.W., Wash., D.C. 20009; and Malcolm L. Wiseman, Jr., 1228 Crittenden St., N.W., Wash., D.C. 20011,

Plaintiffs,

versus

William Jefferson Clinton in his official capacity as The President of the United States, 1600 Pennsylvania Avenue, N.W., Washington, D.C. 20500, Robin H. Carle in her official capacity as The Clerk of the United States House of Representatives, Room H-154, The Capitol, Washington, D.C. 20515, Wilson Livingood in his official capacity as The Sergeant At Arms of the United States House of Representatives, Room H-124, The Capitol, Washington, D.C. 20515, and The District of Columbia Financial Responsibility and Management Assistance Authority, One Thomas Circle, N.W., Washington, D.C. 20005,

Defendants

COMPLAINT

The Plaintiffs, by and through undersigned counsel, ask this honorable court to grant them relief from the actions of the Defendants, saying:

Jurisdiction

1. This is an action for declaratory judgements and injunctions to redress the deprivation of rights and privileges secured to the Plaintiffs by the fourth Clause of the Fifth Amendment (the Due Process Clause, incorporating equal protection guarantees) and by the first Clause of the Fourth Section of the Fourth Article (the Guarantee Clause) of the Constitution of the United States; jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1343(a)(3), 2201, and 2202.

Parties

2. Each Plaintiff is a private citizen suing in her or his personal capacity.

3. Each Plaintiff is a competent adult over the age of eighteen years of age.

4. Each Plaintiff is a citizen of the United States.

5. Each Plaintiff is a permanent resident and domiciliary of the District of Columbia.

6. Each Plaintiff is a qualified voter in the District of Columbia.

7. Defendant William Jefferson Clinton in his official capacity as The President of the United States is responsible for ratifying, approving, implementing, and enforcing Acts, Resolutions, or mandates of Congress, including those pertaining uniquely to the District of Columbia, which means pertaining to the place of residence and work of the Plaintiffs and affecting the lives and rights of the Plaintiffs.

8. Defendant William Jefferson Clinton in his official capacity as The President of the United States is also charged to transmit to Congress the results of each decennial census of the population of the United States, specifying the number of Representatives in the United States House of Representatives to be apportioned to each State, as a portion

of the whole number of Representatives defined by Congress and insofar as Congressional legislation provides for numbers to any State in excess of the minimum number specified in the Second Section of Article One of the Constitution, which number is one.

9. Defendant Robin H. Carle in her official capacity as the Clerk of the United States House of Representatives is charged to certify to the chief executive of each State the number of Representatives apportioned to the State, as a portion of the whole number of Representatives defined by Congress and insofar as Congressional legislation provides for numbers to any State in excess of the minimum number specified in the Second Section of Article One of the Constitution, which number is one.

10. Defendant Robin H. Carle in her official capacity as the Clerk of the United States House of Representatives is also charged to keep a roll of all Representatives and Representatives-elect, comprised of those persons, and those persons only, who are elected in accordance with the laws of the United States, specifically in accordance with the apportionments to the States previously certified by the Clerk.

11. Defendant Wilson Livingood in his official capacity as the Sergeant at Arms of the United States House of Representatives is charged to admit to the Hall of the House of Representatives only those Representatives upon the Clerk's Roll (and certain other staff and assistants) and to bar all other persons from admission during the sessions of the House.

12. Defendant District of Columbia Financial Responsibility and Management Assistance Authority (popularly referred to as the "Control Board") is an entity created by an Act of the Congress of the United States but is defined in the Act creating it as an entity of the government of the District of Columbia; it is comprised of five individuals appointed by the President of the United States.

General Factual Predicate to All Counts

13. By a series of acts taken between 1788 and 1791, the States of Maryland and Virginia ceded to Congress exclusive jurisdiction over an area amounting to 100 square miles straddling the Potomac River.

14. In 1791, Congress accepted the cessions and assumed exclusive jurisdiction over the area, since known as the District of Columbia and designated as the location of the permanent seat of the government of the United States.

15. From 1791 until 1801, despite the exclusive jurisdiction and plenary power of Congress over the District of Columbia, the residents of the District enjoyed all rights and privileges as citizens of Maryland and Virginia, respectively according to whether they lived north-east or south-west of the Potomac River, and of the United States.

16. Specifically, from 1791 until 1801, despite the exclusive jurisdiction and plenary power of Congress over the District of Columbia, the residents of the District of Columbia retained general rights to vote for state and national offices and to participate in the governments of their respective states and in the government of the United States, on the same terms and to the same degree as all other citizens of the respective states of Maryland and Virginia.

17. Specifically, from 1791 until 1801, despite the exclusive jurisdiction and plenary power of Congress over the District of Columbia, the residents of the District were apportioned to congressional districts and were apportioned to districts for statewide legislative offices in Maryland and Virginia, respectively.

18. In 1801, Congress passed acts which were taken to have the effect of terminating all rights of state citizenship for all residents of the District of Columbia.

19. In 1846, Congress reduced the size of the physical territory of the District of Columbia and retroceded to Virginia all that part of the original District of Columbia which lay south-west of the high tide line on the south-west shore of the Potomac River.

20. Retrocession of this area of the District of Columbia to Virginia had been specifically requested by the residents of the area beforehand and was ratified by them by popular vote, in order to be effective.

21. In 1871, Congress erected a form of government, loosely modeled on the governments erected previously for the continental "territories," to perform various functions for the entire remaining District of Columbia.

22. In 1874, Congress terminated this "territorial government" and replaced it with a "temporary" government of three commissioners appointed by the President of the United States.

23. In 1878, Congress made the "temporary" 1874 commission form of government permanent.

24. In 1895, Congress eliminated all remaining independent local governments and jurisdictional distinctions within the District of Columbia and placed all aspects of administration or governance of the entire District of Columbia, at all levels, under the rule of the appointed commissioners.

25. In 1973, Congress replaced the 1874 commission form of government with a government comprised of an elected Mayor and Council, supported by administrative agencies and offices (the so-called "home rule government").

26. When Congress created the home rule government, Congress retained for itself the power to alter or abolish the local government of the District at will, retained the power to veto the laws passed by the home rule government, retained the power to impose any law on the District which Congress sees fit, retained the power to veto or amend the District's local governmental budget, retained the power to control the local courts (the Superior Court of the District of Columbia and the District of Columbia Court of Appeals), retained in federal hands the power to determine who will be judges in those courts, retained in federal hands (delegated to the United States Attorney for the District of Columbia) the power to control prosecution of all serious misdemeanors and felonies, imposed certain fiscal burdens on the home rule government, and deprived the home rule government of the power to tax

the income realized in the District by non-residents, among other things.

27. In 1995, Congress placed the home rule government under the supervision of Defendant Financial Responsibility and Management Assistance Authority (known locally as the "Control Board") and divested the home rule government of certain governmental functions.

28. In 1997, Congress divested the home rule government of almost all governmental functions remaining under control of the home rule government and placed them under the Control Board, leaving the home rule government with no actual power over almost all of the services, agencies, offices, and functions of local government in the District of Columbia.

29. Congress has also delegated to the Defendant Financial Responsibility and Management Assistance Authority (Control Board) the responsibility of making recommendations to Congress what form of government Congress might or should impose over the District of Columbia, which means over the Plaintiffs, in the future.

30. Today, the Plaintiffs are not apportioned to congressional districts, they do not vote for any member of Congress, they do not vote for any member of any state government, they do not govern the jurisdiction of their residences themselves, they are not insulated from intrusions of Congressional power in matters properly within the exclusive competence of state governments by virtue of the Tenth Amendment to the Constitution, but they are subjected to whatever laws Congress chooses to impose and they are taxed by Congress to pay for these actions.

31. Since at least 1801, when the citizens of the District of Columbia first lost their political and civil rights, the citizens of the District, including these Plaintiffs, have repeatedly and in various ways petitioned the government of the United States and its officers and divisions for redress of these and other grievances.

32. Despite their repeated and various petitions and pleas, the citizens of the District of Columbia live under more pervasive, plenary power of Congress today than did their

forebears in 1801, suffering even less freedom and democratic participation in autonomous local governments today than was the case in 1801.

33. Since the Constitution was ratified, the Congress of the United States, by legislation, has acquired and defined territories which would become States, has admitted new States, has partitioned existing single States into two States, and has ceded to States sufficient jurisdiction over places called "federal enclaves," thereby increasing the populations of the States for the purposes of apportionment in the United States Congress.

34. Since the Constitution was ratified, the Congress of the United States, by legislation, has repeatedly defined, set, increased, and reset the number of Representatives comprising the United States House of Representatives in order to guarantee to the citizens of the United States representation in the United States House of Representatives under and in conformity with the terms of Section Two of Article One, Section Four of Article Four, and the Fourteenth Amendment of the United States Constitution.

35. The District of Columbia, presently, is neither a sovereign State nor a part of a sovereign State.

36. The entire area of the District of Columbia or the entire area of the District of Columbia other than the area defined in the United States Code and in the District of Columbia Code as the "National Capital Service Area" could, as matters of law and fact, be admitted to the United States as a sovereign State or could be unified with an existing sovereign State.

COUNT ONE:
The Defendants Violate the Plaintiffs' Rights to Equal Protection of the Laws

Paragraphs 1 through 36 are incorporated by reference.

37. The Plaintiffs are entitled to all the rights in and protections of the Constitution, including the right to the equal protection of the law, also referred to as the right to equal treatment under the law.

38. Congress exercises plenary powers over places called "federal enclaves," which powers are identical in every way and degree to the plenary power Congress exercises over the District of Columbia.

39. Since the birth of the nation, Congress has assumed powers of legislation over more than five thousand federal enclaves of varying size throughout the United States.

40. According to the most recent counts, over one million citizens of the United States reside within these federal enclaves today.

41. By definition, virtually everyone living in a federal enclave hold or held some job with the federal government, exercises or exercised some role in the operations of the federal government, or is married to or is the child of someone who is or was directly involved with the federal government.

42. By definition, virtually all of the physical area of each federal enclave is devoted to and, directly or indirectly, used for the operations of the federal government.

43. For the first century and a half of the nation's life, almost all residents of the federal enclaves were subjected to the same denials of their rights as are suffered by the Plaintiffs.

44. Specifically, the residents of the federal enclaves were not apportioned to congressional districts, they did not vote for any member of Congress, they did not vote for any member of any state government, and they were excluded from all benefits of citizenship in a state, yet they were taxed by Congress to pay for these and other actions.

45. At the time the residents of the federal enclaves were subjected to these conditions, many hundreds of thousands of citizens of the United States resided within the enclaves where these conditions obtained.

46. Congress then took affirmative steps to attenuate if not terminate its exclusive jurisdiction or plenary power over all federal enclaves where any person resides.

47. Today, as a direct result of the steps Congress took, the citizens of every federal enclave are members of the political

communities of the various states in which the federal enclaves are located.

48. Today, as a direct result of the steps Congress took, the citizens of every federal enclave are apportioned representation in Congress, resulting in the participation of the citizens who reside in the federal enclaves in all acts of Congress, through elected representatives.

49. Today, as a direct result of the steps Congress took, the citizens of every federal enclave are apportioned representation in state governments, resulting in the participation of the citizens who reside in the federal enclaves in all acts of their state governments, through representatives elected by them.

50. Congress took these actions, in part, specifically, to insure that the fundamental rights of the citizens of the enclaves to participate in all relevant political processes, to be represented in their governments under the terms of the Constitution of the United States and under the terms of the Constitutions of the various States, and to have full state and federal citizenship would be respected and fulfilled.

51. The actions which Congress took out of respect for the fundamental rights of the residents of the federal enclaves were taken to bring about a specific status which the residents of the federal enclaves had stated, specifically, that they wanted.

52. In no federal enclave has Congress imposed a unique, non-republican form of government.

53. In no federal enclave does Congress prevent the residents from electing representatives to the Congress of the United States.

54. In no federal enclave does Congress rule the lives of the residents directly and intimately, without the possibility of the intervening umbrella of state governments to exercise all non-federal governmental powers.

55. In no federal enclave does Congress fence the residents out of all other rights of state and national citizenship.

56. Congress retroceded the former portion of the District of Columbia lying south-west of the Potomac River to the

State of Virginia for most of the same reasons that Congress took steps to insure that the citizens of the federal enclaves would be treated as full citizens of the states adjacent to or within which the federal enclaves are located.

57. Since 1846, the former part of the District of Columbia south-west of the Potomac River has been fully integrated into the political fabric of the State of Virginia.

58. Today, representation in Congress is apportioned to the citizens of that former part of the District of Columbia on the same basis as it is apportioned to all citizens who live within the federal enclaves, which is the same basis on which it is apportioned to all citizens of the United States other than those who reside within the District of Columbia.

59. Congress has not imposed on the former portion of the District of Columbia lying south-west of the Potomac River any of the depredations which it imposes on the remaining portion of the District of Columbia lying north-east of the Potomac River.

60. No federal interest inheres in the place of residence of any Plaintiff, such that the federal government has any reason, much less a compelling reason, to deprive any Plaintiff of any rights, much less any fundamental rights, or to treat any Plaintiff differently than it has treated the residents of the federal enclaves or the former portion of the District of Columbia lying south-west of the Potomac River, or to treat any Plaintiff differently than it treated the residents of the entire District of Columbia from 1791 until 1801.

61. No federal interest inheres in the *person* of any Plaintiff, such that the federal government has any reason, much less a compelling reason, to deprive any Plaintiff of any rights, much less any fundamental rights, or to treat any Plaintiff differently than it has treated the residents of the federal enclaves or of the former portion of the District of Columbia lying south-west of the Potomac River, or to treat any Plaintiff differently than it treated the residents of the entire District of Columbia from 1791 until 1801.

62. No governmental purpose whatsoever is served by excluding any Plaintiff from participation in the government of

the United States through elected representatives.

63. No governmental purpose whatsoever is served by subjecting any Plaintiff to unfettered governmental control by the Congress of the United States.

64. No governmental purpose whatsoever is served by denying any Plaintiff the benefits of a state government insulated from Congressional interference in matters properly within the exclusive competence of state governments as evidenced by the Tenth Amendment to the Constitution.

65. It is within the power of Congress and Defendants Clinton, Carle, and Livingood to treat the Plaintiffs in a manner identical to that manner with which these Defendants treat the citizens of the federal enclaves and the citizens of the former portion of the District of Columbia south-west of the Potomac River.

66. Despite the fact that there is no reason whatsoever, much less any compelling reason, to treat the Plaintiffs any differently from the treatment accorded to all residents of the federal enclaves, the Plaintiffs' fundamental political and civil rights are denied, while the rights of the residents of the former federal enclaves are respected and they are treated as citizens of states and of the nation.

67. Despite the fact that there is no reason whatsoever, much less any compelling reason, to treat the Plaintiffs any differently from the treatment accorded to all residents of the former portion of the District of Columbia lying south-west of the Potomac River and now in the State of Virginia, the Plaintiffs' fundamental political and civil rights are denied, while the rights of the residents of the former portion of the District of Columbia lying south-west of the Potomac River and now in the State of Virginia are respected and they are treated as citizens of the State of Virginia and of the nation.

68. Despite the fact that there is no reason whatsoever, much less any compelling reason, to treat the Plaintiffs any differently from the treatment accorded to all other citizens of the United States, the Congress of the United States has fenced the residents of the District of Columbia out of all apportionments for representation in a congressional district

or districts, although Congress has taken steps to include in congressional apportionments all formerly excluded citizens of the federal enclaves and all formerly excluded citizens of the former portion of the District of Columbia south-west of the Potomac River.

69. These actions of Congress violate the Plaintiffs' rights to the equal protection of the laws under the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

70. Specifically, the Congress of the United States, with the assistance of Defendant William Jefferson Clinton in his official capacity as the President of the United States, has imposed Defendant District of Columbia Financial Responsibility and Management Assistance Authority upon the District of Columbia, burdening the Plaintiffs, yet the Congress and the Defendant have not imposed a similar agent or instrumentality upon any federal enclave or upon the former part of the District of Columbia lying south-west of the Potomac River, which actions of the Congress and all the Defendants violate the Plaintiffs' rights to the equal protection of the laws under the Due Process Clause of the Fifth Amendment to the Constitution of the United States of America.

71. Specifically, Defendant District of Columbia Financial Responsibility and Management Assistance Authority is directed solely at the citizens of the District of Columbia, which includes the Plaintiffs, and is not directed at any resident of any federal enclave, preventing the Plaintiffs from electing representatives to Congress having full powers and rights under the Constitution, preventing them from enjoying the benefits of citizenship in a state, and trenching on other fundamental constitutional rights, which actions of the Defendant violate the Plaintiffs' rights to the equal protection of the laws under the Due Process Clause of the Fifth Amendment to the Constitution of the United States of America.

72. Defendant William Jefferson Clinton in his official capacity as the President of the United States has ratified,

approved, implemented, and enforced Acts, Mandates, and resolutions of Congress which are directed solely at the citizens of the District of Columbia, which includes the Plaintiffs, and which are not directed at any resident of any federal enclave, preventing the Plaintiffs from electing representatives to Congress having full powers and rights under the Constitution, preventing them from enjoying the benefits of citizenship in a state, and trenching on other fundamental constitutional rights.

73. These actions of Defendant William Jefferson Clinton in his official capacity as President of the United States violate the Plaintiffs' rights to the equal protection of the laws under the Due Process Clause of the Fifth Amendment to the Constitution of the United States of America.

74. Specifically, Defendant William Jefferson Clinton in his official capacity as the President of the United States has transmitted to Congress the results of decennial censuses of the population of the United States, specifying therewith the numbers of Representatives to be apportioned to each State.

75. Specifically, Defendant Clinton's calculations have accounted for and included the entire populations of all federal enclaves and of the former portion of the District of Columbia lying south-west of the Potomac River.

76. Specifically, such inclusions are for the purpose of apportionment of representation in the United States House of Representatives, under the terms of Article One and Amendment Fourteen of the Constitution of the United States, to the citizens of the federal enclaves and to the citizens of former portion of the District of Columbia south-west of the Potomac River.

77. Specifically, Defendant Clinton's calculations have not accounted for and included the population of the District of Columbia for the purpose of apportionment, under the terms of Article One and Amendment Fourteen of the Constitution of the United States, of representation in the United States House of Representatives.

78. Specifically, these actions of Defendant William Jefferson Clinton in his official capacity as President of the

United States violate the Plaintiffs' rights to the equal protection of the laws under the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

79. Specifically, Defendant Robin H. Carle in her official capacity as the Clerk of the United States House of Representatives has certified to the chief executive of each State the number of Representatives apportioned to the State, which apportionments have included the populations of all federal enclaves and of the former portion of the District of Columbia south-west of the Potomac River.

80. Specifically, the apportionments certified by Defendant Carle have not accounted for and included the population of the District of Columbia and no representation under the terms of Article One and Amendment Fourteen of the Constitution of the United States has been apportioned to the District of Columbia in the Defendant's certifications.

81. Specifically, Defendant Robin H. Carle in her official capacity as the Clerk of the United States House of Representatives has enrolled Representatives whose credentials show that they were elected in accordance with the laws of the United States, specifically in accordance with the apportionments to the States previously certified by the Defendant.

82. Specifically, Defendant Carle's Rolls include representatives elected from congressional districts which include the populations of all federal enclaves and from the congressional district including the former portion of the District of Columbia south-west of the Potomac River.

83. Specifically, Defendant Carle's enrollments have not included representatives of the citizens of the District of Columbia, serving under the terms of Article One and Amendment Fourteen of the Constitution of the United States or otherwise.

84. Specifically, these actions of Defendant Robin H. Carle in her official capacity as the Clerk of the United States House of Representatives violate the Plaintiffs' rights to the equal protection of the laws under the Due Process Clause of the Fifth Amendment to the Constitution of the United States of

America.

85. Specifically, Defendant Wilson Livingood in his official capacity as the Sergeant at Arms of the United States House of Representatives has admitted to the Hall of the House for sessions of the House Representatives on the Rolls of Defendant Robin H. Carle in her official capacity as the Clerk of the United States House of Representatives.

86. Specifically, Defendant Livingood has enforced Rolls which have included Representatives elected from congressional districts which include the populations of all federal enclaves and from the congressional district including the former portion of the District of Columbia south-west of the Potomac River, but which Rolls have not included representatives of the District of Columbia under the terms of Article One and Amendment Fourteen of the Constitution of the United States.

87. Specifically, these actions of Defendant Wilson Livingood in his official capacity as the Sergeant at Arms of the United States House of Representatives violate the Plaintiffs' rights to the equal protection of the laws under the Due Process Clause of the Fifth Amendment to the Constitution of the United States of America.

COUNT TWO:
The Defendants Violate the Plaintiffs' Rights to Republican Forms of Government and Violate the Plaintiffs' Privileges to Rely upon the Defendants' Obligation to Guarantee to All Citizens Republican Forms of Government

Paragraphs 1 through 36 are incorporated by reference.

88. The Plaintiffs are entitled to all the rights and privileges in and protections of the Constitution, including the right to republican forms of government and including the privilege of relying upon the obligation of all members of the federal government to guarantee to them republican forms of government.

89. The Plaintiffs are entitled to other fundamental rights and privileges to participate in the political process, to be

represented in government, to vote, to run for office, to have full state and federal citizenship, which rights and privileges are also inferred under the right to enjoy republican forms of government and under the privilege of relying upon the obligation of all members of the federal government to guarantee to them republican forms of government.

90. The Plaintiffs are entitled to the right to a state government insulated from Congressional interference in matters properly within the exclusive competence of state governments generally, as evidenced by the Tenth Amendment to the Constitution, which right is inferred under the right to enjoy republican forms of government and under the privilege of relying upon the obligation of all members of the federal government to guarantee to them republican forms of government.

91. The home rule government (comprised of the Council of the District of Columbia, the Mayor of the District of Columbia, and the various administrative departments) does not constitute a republican form of government, because every action of the home rule government is subject to absolute review and veto by the Congress of the United States itself or by Defendant District of Columbia Financial Responsibility and Management Assistance Authority acting as an administrative agent or instrumentality for the Congress of the United States of America and because the home rule government was created by an act of Congress and not by an autonomous act of the citizens of the District of Columbia and because the Congress of the United States holds the exclusive power to alter or abolish the home rule government at any time.

92. The Congress of the United States, when it exercises any power of government over or concerning the District of Columbia, is not a republican form of government, because the Congress of the United States is not elected by the citizens of the District of Columbia.

93. The Defendant District of Columbia Financial Responsibility and Management Assistance Authority is not a republican form of government because it was not elected by

the citizens of the District of Columbia, because it is not subject to their control, and because it was created by the Congress of the United States and is subject always to the power and control of the Congress of the United States.

94. Defendants William Jefferson Clinton in his official capacity as the President of the United States, Robin H. Carle in her official capacity as the Clerk of the United States House of Representatives, and Wilson Livingood in his official capacity as the Sergeant at Arms of the United States House of Representatives are all officers and agents of the government of the United States, since their powers arises directly from the Constitution of the United States or from Acts of Congress under powers presumed to arise directly from the Constitution.

95. Defendant District of Columbia Financial Responsibility and Management Assistance Authority is an agent or instrumentality of the federal government, since it was created by an Act of Congress under powers purported to arise from the Constitution of the United States and all power it exercises follows only from Acts of Congress.

96. Therefore, all Defendants are obligated to guarantee to the Plaintiffs republican forms of government.

97. It is within the powers of the Congress and Defendants Clinton, Carle, Livingood, and District of Columbia Financial Responsibility and Management Assistance Authority to take steps to guarantee republican forms of government to the Plaintiffs.

98. All Defendants, however, in their various offices and through their enforcement of or compliance with various Acts, Resolutions, or mandates of Congress and by acts of their own in their official capacities, actively prevent institution of any republican form of government specifically for or over the District of Columbia.

99. A republican form of government specifically for or over the District of Columbia would be a government elected by the citizens of the District of Columbia, including by the Plaintiffs, as the citizens of a state or as the citizens of a portion of a state.

100. All Defendants, in their various offices and through their enforcement of or compliance with various Acts, Resolutions or mandates of Congress and by acts of their own in their official capacities, actively prevent participation of the citizens of the District of Columbia, including the Plaintiffs, in the Congress of the United States by elected representatives, serving under the terms of Article One and Amendment Fourteen of the Constitution of the United States.

101. The Plaintiffs could participate in the Congress of the United States by elected representatives, serving under the terms of Article One and Amendment Fourteen of the Constitution of the United States, if the District of Columbia were a state or a part of a state.

102. If the Plaintiffs participated in the Congress of the United States by elected representatives, the Congress of the United States would be, in relation to the District of Columbia, republican form of government.

103. These actions of the Defendants and of Congress, generally, violate the Plaintiffs' rights to republican forms of government under the first Clause of the fourth Section of Article Four of the Constitution of the United States of America.

104. These actions of the Defendants and of Congress, generally, violate the Plaintiffs' privilege of relying upon the obligation of all members of the federal government to guarantee to them republican forms of government.

105. The Congress of the United States, with the assistance and efforts of the Defendants, has not apportioned representation in Congress to the citizens of the District of Columbia.

106. The Congress of the United States, with the assistance and efforts of the Defendants and others, could apportion to the citizens of the District of Columbia, including the Plaintiffs, representation in the Congress of the United States under the terms of Article One and Amendment Fourteen of the Constitution of the United States if the District of Columbia were a sovereign state or a part of a sovereign state.

107. These actions of the Defendants and of Congress violate the Plaintiffs' rights to republican forms of government under the first Clause of the fourth Section of Article Four of the Constitution of the United States of America.

108. These actions of the Defendants and of Congress violate the Plaintiffs' privilege of relying upon the obligation of all members of the federal government to guarantee to them republican forms of government.

109. The Congress of the United States, with the assistance and efforts of the Defendants, has prevented the Plaintiffs from enjoying the benefits of a state government, insulated from Congressional interference in matters of local concern by virtue of the enumerations of power in Section 8 of Article I of the Constitution and as evidenced by the Tenth Amendment to the Constitution.

110. These actions of Congress and of the Defendants violate the Plaintiffs' rights to republican forms of government under the first Clause of the fourth Section of Article Four of the Constitution of the United States of America.

111. These actions of Congress and of the Defendants violate the Plaintiffs' privilege of relying upon the obligation of all members of the federal government to guarantee to them republican forms of government.

112. Specifically, Defendant William Jefferson Clinton in his official capacity as the President of the United States has ratified, approved, implemented, and enforced Acts, Mandates, and resolutions of Congress, which are antithetical to the principles of a republican form of government and all of which acts directly oppose and prevent the Plaintiffs from enjoying republican forms of government.

113. Specifically, Defendant William Jefferson Clinton in his official capacity as The President of the United States has transmitted to the Congress the results of decennial censuses of the population of the United States, including the numbers of Representatives to be apportioned to each State, which apportionments have not included apportionments of representation to the District of Columbia under the terms of Section Two of Article One, Section Four of Article Four, and

the Fourteenth Amendment of the United States Constitution.

114. Specifically, Defendant Robin H. Carle in her official capacity as the Clerk of the United States House of Representatives has certified to the chief executive of each State the number of Representatives apportioned to the State, which apportionments have not included apportionments of representation to the District of Columbia under the terms of Section Two of Article One, Section Four of Article Four, and the Fourteenth Amendment of the United States Constitution.

115. Specifically, Defendant Robin H. Carle in her official capacity as the Clerk of the United States House of Representatives has enrolled Representatives whose credentials show that they were elected in accordance with the laws of the United States, but the Defendant's Rolls have not included representatives of the District of Columbia under the terms of Section Two of Article One, Section Four of Article Four, and the Fourteenth Amendment of the United States Constitution.

116. Specifically, Defendant Wilson Livingood in his official capacity as the Sergeant at Arms of the United States House of Representatives has admitted Representatives on the Rolls of Defendant Robin H. Carle in her official capacity as the Clerk of the United States House of Representatives, which Rolls have not included representatives of the District of Columbia under the terms of Section Two of Article One, Section Four of Article Four, and the Fourteenth Amendment of the United States Constitution.

117. These specific actions of the Defendants violate the Plaintiffs' rights to republican forms of government under the first Clause of the fourth Section of Article Four of the Constitution of the United States of America.

118. These specific actions of the Defendants violate the Plaintiffs' privilege of relying upon the obligation of all members of the federal government to guarantee to them republican forms of government.

Relief Sought

Therefore, in light of the facts stated herein and because the Plaintiffs have no alternative avenue for relief from these injuries than through this court, the Plaintiffs respectfully ask this honorable Court to set this matter for trial before a jury of the Plaintiffs' peers, and thereupon:

A. To issue declaratory judgments that:

1. The Plaintiffs and all citizens of the District of Columbia have the right to the equal protection of the laws, also expressed as the right to stand on an equal footing with all other citizens of the United States, and

2. The Plaintiffs and all citizens of the District of Columbia have the right to enjoy republican forms of government, such as are inherent in a federal system, which means that:

   a. The citizens of the District of Columbia have the right to be apportioned to a congressional district or districts, such that they will participate in the government of the United States through duly elected representatives to the United States House of Representatives and therefore as well through duly elected representatives to the United States Senate, having powers and privileges identical to those of all other members of Congress, and that

   b. The citizens of the District have the right to participate through duly elected representatives in a state government insulated from Congressional interference in matters properly within the exclusive competence of state governments, as evidenced by the Tenth Amendment to the Constitution, and

3. The Plaintiffs and all citizens of the District of Columbia have the privilege of relying upon the obligation of all branches, officers, agents, and instrumentalities of the

federal government to guarantee republican forms of government to them, which obligation "to guarantee" means taking overt steps forthwith to enable, facilitate, and apportion representation in such governments;

B. To issue further declaratory judgments that:

1. Imposition of the District of Columbia Financial Responsibility and Management Assistance Authority and the imposition by the Congress of the United States of other instrumentalities and actions uniquely concerning the District of Columbia violates the Plaintiffs' rights to the equal protection of the laws under the United States Constitution by treating the residents of the District of Columbia differently than the residents of the federal enclaves, by treating the residents of the District of Columbia differently than the residents of the former portion of the District south-west of the Potomac River and now in Virginia, and by treating the residents of the District of Columbia differently than the residents of the United States outside the District of Columbia, and

2. The failure of the Congress of the United States to apportion the citizens of the District of Columbia to a congressional district or districts, in accord with their expressed wishes and under the terms of Section Two of Article One and the Fourteenth Amendment of the United States Constitution, after taking steps to insure that the citizens of the federal enclaves and the citizens of the former portion of the District of Columbia south-west of the Potomac River have been apportioned to congressional districts, violates the Plaintiffs' rights to the equal protection of the laws under the United States Constitution, and

3. Imposition of the District of Columbia Financial Responsibility and Management Assistance Authority and the imposition by the Congress of the United States of other instrumentalities and actions uniquely

concerning the District of Columbia violates the Plaintiffs' rights to republican forms of government under the first Clause of the fourth Section of Article Four of the Constitution of the United States of America and violates the Plaintiffs' privilege of relying upon the obligation of all members of the federal government to guarantee to them republican forms of government, and

4. The failure of the Congress of the United States to take steps to insure that the citizens of the District of Columbia will be apportioned to congressional districts in accord with their expressed wishes violates the Plaintiffs' rights to republican forms of government under the first Clause of the fourth Section of Article Four of the Constitution of the United States of America and violates the Plaintiffs' privilege of relying upon the obligation of all members of the federal government to guarantee to them republican forms of government;

C. To issue mandatory and perpetual injunctions directed to and with the effect that:

1a. Defendant William Jefferson Clinton in his official capacity as The President of the United States and his successors and assigns shall not approve, ratify, implement, or enforce any Act, Resolution, or mandate of Congress (1) which applies to the District of Columbia *and* (2) which does not immediately apply in real terms (determined by whether any action, behavior, or expenditure of money is changed or affected) to the entire United States, *and* (3) which has not been *previously* ratified by the citizens of the District of Columbia by direct vote or by vote of their then elected representatives in the interim home rule government, effective until such time as the District of Columbia (or all the District of Columbia other than the National Capital Service Area as defined in the United States Code on the date this suite was filed) is admitted as a sovereign State on equal footing with all other sovereign States of the

United States of America or until such time as the District of Columbia (or all the District of Columbia other than the National Capital Service Area as defined in federal law on the date this suite was filed) is unified with a previously-existing sovereign State of the United States of America, on an equal footing with all other jurisdictions of that State, the choice among these alternatives to be solely decided by the citizens of the District of Columbia,

1b. Defendant William Jefferson Clinton in his official capacity as The President of the United States and his successors and assigns shall not transmit to the Congress, on the basis of the decennial census or other enumeration, any number of Representatives to be apportioned to each State other than the minimum number of Representatives to which each State is entitled under Section Two of Article One of the Constitution of the United States, which number is one, until such time as the District of Columbia (or all the District of Columbia other than the National Capital Service Area as defined in the United States Code on the date this suite was filed) is admitted as a sovereign State on equal footing with all other sovereign States of the United States of America or until such time as the District of Columbia (or all the District of Columbia other than the National Capital Service Area as defined in federal law on the date this suite was filed) is unified with a previously-existing sovereign State of the United States of America, on an equal footing with all other jurisdictions of that State, the choice among these alternatives to be solely decided by the citizens of the District of Columbia,

2a. Defendant Robin H. Carle in her official capacity as the Clerk of the United States House of Representatives shall not certify to any State any number of Representatives apportioned to the State

other than the minimum number of Representatives to which each State is entitled under Section Two of Article One of the Constitution of the United States, which number is one, until such time as the District of Columbia (or all the District of Columbia other than the National Capital Service Area as defined in the United States Code on the date this suite was filed) is admitted as a sovereign State on equal footing with all other sovereign States of the United States of America or until such time as the District of Columbia (or all the District of Columbia other than the National Capital Service Area as defined in federal law on the date this suite was filed) is unified with a previously-existing sovereign State of the United States of America, on an equal footing with all other jurisdictions of that State, the choice among these alternatives to be solely decided by the citizens of the District of Columbia,

2b. Defendant Robin H. Carle in her official capacity as the Clerk of the United States House of Representatives shall not enroll as members of the House of Representatives any more than the minimum number of Representatives to which each State is entitled under Section Two of Article One of the Constitution of the United States, which number is one member per State, until such time as the District of Columbia (or all the District of Columbia other than the National Capital Service Area as defined in the United States Code on the date this suite was filed) is admitted as a sovereign State on equal footing with all other sovereign States of the United States of America or until such time as the District of Columbia (or all the District of Columbia other than the National Capital Service Area as defined in federal law on the date this suite was filed) is unified with a previously-existing sovereign State of the United States of America, on an equal footing with all other jurisdictions of that State, the

choice among these alternatives to be solely decided by the citizens of the District of Columbia,

3. Defendant Wilson Livingood in his official capacity as the Sergeant at Arms of the United States House of Representatives shall not admit to the Hall of the House of Representatives for sessions of the House any more than the minimum number of Representatives to which each State is entitled under Section Two of Article One of the Constitution of the United States, which number is one member per State, until such time as the District of Columbia (or all the District of Columbia other than the National Capital Service Area as defined in the United States Code on the date this suite was filed) is admitted as a sovereign State on equal footing with all other sovereign States of the United States of America or until such time as the District of Columbia (or all the District of Columbia other than the National Capital Service Area as defined in federal law on the date this suite was filed) is unified with a previously-existing sovereign State of the United States of America, on an equal footing with all other jurisdictions of that State, the choice among these alternatives to be solely decided by the citizens of the District of Columbia;

4. The Defendant District of Columbia Financial Responsibility and Management Assistance Authority shall take no further action or enter any further orders or directives concerning the District of Columbia, shall surrender all records to the government created by the Home Rule Act, shall offer to convey to the home rule government the contracts and services of all persons employed or contracted for services by the Defendant, and shall disband itself, leaving the government of the District of Columbia to the home rule government serving as an interim government of the District of Columbia to facilitate transition of the District of Columbia to the status of sovereign State or to unification with an existing sovereign State, the choice

between these alternatives to be solely decided by the citizens of the District of Columbia.

D. To award to the Plaintiffs all costs and reasonable attorneys' fees and expenses of this suit; and

E. To issue such other, additional relief as appropriate.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOIS E. ADAMS, *et al.*, Plaintiffs, v. WILLIAM JEFFERSON CLINTON, *et al.*, Defendants.	) Civ. No. 98–1665 (LFO)
CLIFFORD ALEXANDER, *et al.*, Plaintiffs, v. WILLIAM M. DALEY, *et al.*, Defendants.	) Civ. No. 98–2187 (LFO)

FILED
Nov[ember] 6, 1998
Nancy Mayer-Whittington, Clerk
U.S. District Court

REQUEST FOR DESIGNATION
OF A THREE-JUDGE COURT

TO THE HONORABLE HARRY T. EDWARDS, CHIEF JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT:

For the reasons stated in an accompanying memorandum, it is hereby respectfully requested, pursuant to the provisions of 28 U.S.C. § 2284, that you designate two judges in addition to myself to participate in hearing and determining the plaintiffs' complaints for injunctive and declaratory relief.

S/ Louis F. Oberdorfer
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOIS E. ADAMS, *et al.*, Plaintiffs, v. WILLIAM JEFFERSON CLINTON, *et al.*, Defendants.	Civ. No. 98–1665 (LFO)
CLIFFORD ALEXANDER, *et al.*, Plaintiffs, v. WILLIAM M. DALEY, *et al.*, Defendants.	Civ. No. 98–2187 (LFO)

FILED
Nov[ember] 6, 1998
Nancy Mayer-Whittington, Clerk
U.S. District Court

MEMORANDUM

Two complaints filed by two sets of residents of the District of Columbia allege that Congress has unconstitutionally excluded them from apportionment to a congressional district. Orders entered November 3, 1998, consolidated the cases. Preliminarily, both sets of plaintiffs request that their cases be set before a three-judge district court in the manner contemplated by 28 U.S.C. § 2284(b) (1). That statute requires the convening of such a court "when an action is filed challenging the constitutionality of the apportionment of congressional districts." 28 U.S.C. § 2284(a). Whether a three-judge court is called for turns on: "(1) whether the complaint formally alleges a basis for equitable relief; (2) whether the constitutional question presented is substantial; and (3) whether the case presented otherwise comes within the requirements of the . . . three-judge statute." Police Officers

Guild, Nat'l Union of Police Officers v. Washington, 369 F. Supp. 543, 548-49 (D.D.C. 1973).

I.

The defendants named in the complaint in Adams v. Clinton include the President, ministerial officials of the House of Representatives, and the District of Columbia Financial Responsibility and Management Assistance Authority. The President and the House officials are alleged to have a role in effecting periodic apportionments to congressional districts as contemplated by Article I, § 2, cl. 3, of the Constitution; the Adams complaint seeks to enjoin their execution of any further apportionment until Congress has cured the claimed violations of plaintiffs' alleged constitutional rights. In addition, the Adams plaintiffs seek declarations that the present apportionments denying them representation in Congress violate their constitutional rights to a republican form of government and to the equal protection of the laws, as guaranteed by Article IV, 6 §, and § 1 of the Fourteenth Amendment. These substantive complaints and plaintiffs' prayers for relief allege bases for equitable relief (which may or may not be granted) that clearly satisfy the first prong of the Police Officers Guild syllogism.

II.

Whether either constitutional question is substantial presents a more difficult problem. It is plaintiffs' contention, essentially, that the results of the reapportionment process, mandated by Congress in lieu of decennial reapportionment legislation, see Franklin v. Massachusetts, 505 U.S. 788, 791-92 (1992), violate Congress' constitutional apportionment obligation. The process does not merely provide plaintiffs with disproportionate representation in Congress; it provides no representation – zero. Compare Board of Estimate of New York v. Morris, 489 U.S. 688, 702 (1989) with Swann v. Adams, 385 U.S. 440 (1967). Thus, plaintiffs argue that the apportionment process deprives them of a republican form of government because it leaves them unrepresented in the

legislative body (Congress) authorized by the Constitution "[t]o exercise exclusive Legislation in all Cases whatsoever" involving them and the political subdivision in which they reside, the District of Columbia. U.S. Const. art. I, § 8, cl. 17. Plaintiffs also claim that they are denied the equal protection of the laws because District residents, who are subject to Congress' "exclusive" legislative power, are not represented in Congress, while residents of former federal enclaves and other sites over which Congress is empowered to "exercise like Authority" are. Id. (defining other sites as "Forts, Magazines, Arsenals, dock Yards, and other needful Buildings," e.g., the Bethesda Naval Hospital Complex).

A constitutionally insubstantial claim, for three-judge .court purposes, has been authoritatively described as "essentially fictitious," "wholly insubstantial," "obviously frivolous," and "obviously without merit," words that "[i]n the context of prior [Supreme Court] decisions . . . import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous . . . ." Goosby v. Osser, 409 U.S. 512, 518 (1973) (citations omitted) (emphasis added); see also Washington v. Confederated Tribes, 447 U.S. 134, 147-48 (1980); LaRouche v. Fowler, 152 F.3d 974, 98283, 986 (D.C. Cir. 1998).

While plaintiffs cite no cases that embrace their theories, they emphasize that their claims raise original issues that have textual and tangential decisional support. For example, in another context they point to the following statement of the Supreme Court in Board of Estimate of New York v. Morris: "[I]n this country the people govern themselves through their elected representatives and . . . each and every citizen has an inalienable right to full and effective participation in the political processes of the legislative bodies of the [n]ation, [s]tate, [and] locality . . . ." 489 U.S. at 693 (citations omitted).

Plaintiffs also confront dictum of the D.C. Court of Appeals that the Guarantee Clause "applies to the states and cannot be read to restrict the power of Congress to legislate for the District." Darby v. United States, 681 A.2d 1156, 1158 (D.C. 1996), cert. denied, 117 S. Ct. 596 (1997). Plaintiffs argue,

however, that a D.C. Court of Appeals decision is not preclusive, that its dictum is supported by no relevant Supreme Court authority, and that the issue in Darby about jurisdiction of the D.C. courts involved a quite different question from those posed here. It appears that no case binding on this court resolves the question whether, in the context here, the District may or should be treated as State for the purpose of Article 4, § 4. Cf. District of Columbia v. Carter, 609 U.S. 418, 420, 93 S. Ct. 602, 604 (1973).

The plaintiffs contend that no court has ruled authoritatively on the question whether a republican form of government, as that term is used in the Constitution, is denied to other persons unrepresented in the body that has authority "[t]o exercise exclusive Legislation . . . over" them and the District in which they live. Article IV, § 4, obligates "[t]he United States" (not just the Congress) to "guarantee to every State . . . a Republican Form of Government, and [to] protect each of them against Invasion . . . and . . . against domestic Violence." If, as it seems apparent, Article IV, § 4, obligates the United States to afford the District and its residents the same protection from "Invasion" and "domestic Violence" as is enjoyed by the several states and their residents, it may follow that, to the extent, if any, that Article IV guarantees to the states and their residents a republican form of government vis-a-vis the legislature that governs them, the District and its residents are entitled to the same guarantee – irrespective of whether the District is a State for the purpose of the Guarantee Clause. The plaintiffs' claims are not rendered "obviously without merit" by cases suggesting that the Guarantee Clause necessarily involved a political question. See New York v. United States, 505 U.S. 144, 183-86, 112 S. Ct. 2408, 2432-33 (1992).

Further, it is not obvious that plaintiffs' equal protection claim is frivolous. The mere fact that plaintiffs are not challenging a statute that draws explicit distinctions between the District of Columbia and other federal enclaves with respect to apportionment does not establish conclusively that they are not challenging an arguably discriminatory distinction

drawn by Congress and affected by the apportionment process conducted periodically by defendants. Therefore the equal protection claim is not obviously without merit.

Then there is the Twenty-third Amendment, § 1 of which states:

> The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:
> A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

(emphasis added). It could be argued that the plaintiffs' claims would mean that the Twenty-third Amendment was superfluous. Cf. Hobson v. Tobriner, 255 F. Supp. 295, 300 (D.D.C. 1966); Adam H. Kurland, Partisan Rhetoric, Constitutional Reality, and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation, 60 Geo. Wash. L. Rev. 475 (1992). While this might be a significant issue in resolving the merits, it cannot be decisive at this stage. Constitutional interpretation that renders a provision of the Constitution superfluous may be disfavored, but it does not make the proposed interpretation patently frivolous. See, e.g., United States v. Stanley, 483 U.S. 669, 682 n.6, 107 S. Ct. 3054, 3063 n. 6 (1987); Sanford Levinson, Accounting for Constitutional Change, 8 Const. Commentary 409, 422-28 (1991).

Or perhaps the language of the Amendment underscored above dooms the plaintiffs' allegations: it seems to imply that the District is not entitled to representation in Congress. But the implication is not strong enough to extinguish the plaintiffs' claims at the threshold of their suits. If the

Constitution entitled the District to voting representation in Congress before the Twenty-third Amendment, the underscored language did not unquestionably work a repeal. If the Constitution did not entitle the District to voting representation in Congress prior to the Amendment, the Amendment is irrelevant to the analysis -- no one is arguing that it created such an entitlement. And there does not seem to be evidence that the Twenty-third Amendment was intended to resolve ambiguity about the right of District citizens to vote in Congress. See David E. Kyvig, Explicit & Authentic Acts. Amendment the U.S. Constitution 1776-1995, at 352-55 (1996). The language of the Twenty-third Amendment very likely reflects the assumption that District citizens had no right to elect voting members of Congress. See H. Rep. No. 86-1698, at 2-3, reprinted in 1960 U.S.C.C.A.N. 1459, 1460-61. But the assumptions of the participants in the drafting and ratifying of the Twenty-third Amendment do not necessarily indicate the proper interpretation of constitutional provisions adopted by the Founders. In addition, the underscored language appears to have been chosen merely to conform closely to the formulation of Article II, § 1 -- "Each State shall appoint . . . a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in Congress" -- rather than to affect the right to elect voting members of Congress. See H.R. Rep. No. 86-1698, at 4 (1960), reprinted in 1960 U.S.C.C.N. 1459, 1462.

Even if there is some apparent tension between the Twenty third Amendment and Article 4, § 4, that would not render the plaintiffs' claims wholly insubstantial. If essence of the ideal republican form of government is the right to representation in the governing legislature, see. e.g., 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 328 (Jonathan Elliot ed., 2d ed. 1836) ("A republic, where the people at large, either collectively or by representation, form the legislature.") (speech of Charles Pickney, S.C.); cf. The Federalist No. 71, at 483 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("The tendency of the legislative authority to absorb every other, has been fully

displayed and illustrated by examples .... In governments purely republican, this tendency is almost irresistible.") (emphasis added), then the Twenty-third Amendment's establishment of a right to a voice in the selection of the President and Vice-President, as distinguished from the national legislature, would be essentially outside the domain of the Guarantee Clause. So the Twenty-third Amendment may have been necessary because it provided a right to elect a President, not the Fourteenth Amendment guarantee of a republican form of government.

The plaintiffs' claims also cannot be dismissed out of hand on the basis of the failure of the several states to ratify a proposed constitutional amendment stating that the District would be treated as a State "for purposes of representation in Congress." H.R.J. Res. 554, § 1, 95th Cong. (1978); see H.R. Rep. No. 95-886 (1978). The proposed amendment received the support of two-thirds of the members of the House and of the Senate, but was ratified by only 16 states – much fewer than the 38 required – during the period provided for ratification. See Kyvig, supra, at 420-25. Although the congressional proponents of the proposed amendment maintained that "[i]f the citizens of the District are to have voting representation in..the Congress, a constitutional amendment is essential," H.R. Rep. No. 95-886, at 4, a failed constitutional amendment does not alter the meaning of the Constitution, and the views of a failed amendment's congressional supporters have no well-established significance.

Plaintiffs theories are unique. They may well founder, for example, on the specific reference to "states" in the relevant constitutional clauses, the structure of the Constitution, or the Congress' exclusive legislative authority over the District of Columbia. The issues that they raise also may turn out to be non-justiciable political questions, even though the concept of justiciability is becoming murkier and murkier. See United States House of Representatives v. United States Dep't of Commerce, et al., No. 98-0456, 1998 U.S. Dist. LEXIS 13133 at *31, 57-61 (D.D.C. Aug. 24, 1998). Nonetheless, the claims

plaintiffs present are sufficiently tenable to justify reference of the case to a three-judge district court.

III.

Finally, plaintiffs argue that this case "comes within the requirements of the . . . three-judge statute," and therefore satisfies the third prong of the Police Officers Guild standard. 369 F. Supp. at 548-49. That statute, to reiterate, calls for a three-judge court when a case challenges "the constitutionality of the apportionment of congressional districts." 28 U.S.C. § 2284(a). For the purpose of this statute, apportionment means the allocation of congressional districts "among units entitled to representation." Black's Law Dictionary 99 (6th ed. 1990). Defendants are correct that the District of Columbia is not apportioned a congressional district under the current apportionment scheme. The District's exclusion from apportionment, however, does not mean necessarily that plaintiffs' case does not challenge the constitutionality of the apportionment of congressional districts. In fact, such exclusion, and plaintiffs' prayer for a declaration that the District cannot constitutionally be left out of the apportionment process, indicate that the core of plaintiffs' case is a challenge to the apportionment of congressional districts. It seems clear that an apportionment that, for example, allocated no representatives at all to Alaska could be challenged under § 2284(a). It would be odd if a plaintiff could invoke § 2284(a) where a state was allocated some fraction of the districts to which it were entitled, unless it were allocated no districts at all. Admittedly, it would not be absurd if § 2284(a) operated that way. The Constitution explicitly requires that "each state shall have at least one representative." Art. I, § 2, cl. That explicit constitutional directive might have prompted Congress to distinguish between an allocation of no representatives and any other allocation of too few districts. But the plain language of § 2284(a) does not reflect such a distinction. In fact, there is no evidence that Congress made that distinction. The case law that defendants invoke, see, e.g., City of Philadelphia v.

Klutznick, 503 F. Supp. 657, 658 (E.D. Pa. 1980) (denying application for three-judge court because "[n]o existing apportionment is challenged here"); Federation of American Immigration Reform v. Klutznick, 486 F. Supp. 564, 577 (D.D.C. 1980), does not prove otherwise. In Philadelphia, the city of brotherly love was not complaining about the number of congressional districts allocated to the Commonwealth of Pennsylvania or to the city; it was concerned about census practices that might affect a future allocation. The situation in FAIR was similar: the court concluded that plaintiffs were simply "challeng[ing] ... census practices potentially affecting allocations of House members to states," 484 F. Supp. 577 (emphasis added), rather than an existing allocation. These plaintiffs, in contrast, do challenge their existing allocation of zero representatives. Accordingly, the third prong of the Police Officers Guild standard is satisfied.

IV.

Although the details of their arguments differ on some points, both sets of plaintiffs base their claims on equal protection and a guaranteed right to a republican form of government. The plaintiffs in Alexander v. Daley advance additional constitutional arguments. And the Alexander complaint, unlike the Adams complaint, maintains that the constitution entitled citizens of the District to voting representation in the United States Senate. Since the intersection of the two cases falls within the scope of 28 U.S.C. § 2284(a), it is not necessary to discuss the details of the additional theories of the Alexander plaintiffs at this time. Cf. 22 Moore's Federal Practice § 404.02[2] [d] [i] (3d ed. 1998) (noting three-judge court has discretion to retain jurisdiction of non three-judge claims).

For all the reasons discussed above, the Chief Judge of this Circuit is requested to assign two other judges to participate in hearing and determining the plaintiffs' complaints for injunctive and declaratory relief.

S/ Louis F. Oberdorfer
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOIS E. ADAMS, *et al.*,	)	
Plaintiffs,	)	Civ. No. 98–1665
v.	)	(LFO, MBG, CKK)
WILLIAM JEFFERSON CLINTON,	)	
et al., Defendants.	)	

FILED
May 17, 2000
Nancy Mayer-Whittington, Clerk
U.S. District Court

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Lois E. Adams, the Rev. Mr. Floyd H. Agostinelli, Acie L. Byrd, Jr., Lawrence Alston Gray, the Rev. Graylan Scott Hagler, Lawrence Benjamin Harris, Wimberly Higgs, Bette J. Hoover, Anise Jenkins, Rahim Jenkins, Marilyn Killingham, Dujuan Ricardo Malachi, Lamont B. Mitchell, Loree H. Murray, the Rev. Anita O'Brien, Sam Smith, and Malcolm L. Wiseman, Plaintiffs in the case *Lois E. Adams, et al., v. William Jefferson Clinton, et al.*, Civil Action No. 98-1665, hereby appeal to the Supreme Court of the United States from the final Judgment of a Three-Judge District Court entered on March 20, 2000. This Judgment denied the Plaintiffs' Motion for Summary Judgment with respect to all claims challenging the constitutionality of the apportionment of congressional districts and granted Motions to Dismiss all claims challenging the constitutionality of the apportionment of congressional districts filed by Defendants William Jefferson Clinton in his official capacity as President of the United States, Jeff Trandahl[1] in his official capacity as Clerk of the United States House of Representatives, and Wilson Livingood in his official capacity as Sergeant-at-Arms

[1] Robin H. Carle was originally the named Clerk of the House, but she was replaced by Mr Trandahl under Fed. R. Civ. P. 25(d)(1) in January of 1999.

of the House of Representatives. In summary, this order dismissed the Plaintiffs' Complaint challenging the apportionment of congressional districts and denied the Plaintiffs' demands for permanent injunctions against the Defendants with regard to their roles in apportionment of congressional districts.

This appeal is taken pursuant to 28 U.S.C. § 1253, providing that "any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges." Because this case involved a "challeng[e to] the constitutionality of an apportionment of congressional districts[,]" it was heard by a Three-judge District Court under 28 U.S.C. § 2284(a).

It may also be noted that the Three-judge District Court's March 20, 2000 *Judgment* appealed from constitutes final judgment of all issues before the Three-judge District Court.[2]

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[2] The Three-judge District Court remanded all issues *not* concerned with apportionment of congressional districts to the (single judge) District Court.